Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL N. BRUCE
COUNTY COUNSEL
COUNTY OF INYO

JOHN DOUGLAS KIRBY
Counsel of Record

LAW OFFICES OF JOHN D. KIRBY
A PROFESSIONAL CORPORATION
9747 BUSINESS PARK AVENUE
SAN DIEGO, CA 92131
(858) 621-6244

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

3. Whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who conducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners

Petitioner Inyo County is a public entity and a County of the State of California. Petitioner Phil McDowell is an individual, and is also the elected District Attorney of Inyo County. He has been sued in his individual capacity, as well as in his official capacity as the District Attorney. Petitioner Dan Lucas is an individual, and is also the elected Sheriff of Inyo County. He also has been sued in his individual capacity, as well as in his official capacity as Sheriff. Petitioners were the defendants in the District Court, and the appellees in the Ninth Circuit Court of Appeals.

Respondents

Respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony is a federally-recognized Indian tribe. It uses the pseudonym "Bishop Paiute Tribe." The tribe is the sole owner of the respondent Bishop Paiute Gaming Corporation, a tribal corporation formed to conduct the business of a commercial gaming casino in Inyo County, California. The commercial gaming casino does business under the name of the "Paiute Palace Casino." Respondents were the plaintiffs in the District Court, and the appellants in the Ninth Circuit Court of Appeals.

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Petitioners respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The January 4, 2002, opinion of the Ninth Circuit (App., infra, pages 9a-43a) is reported at 975 F.3d 893. The May 20, 2002, order of the Ninth Circuit (App., infra, pages 1a-8a) amending the 1/4/02 opinion, and denying the petition for rehearing *en banc*, was ordered to be published. The November 22, 2000, order of the District Court (App., infra, 44a-66a) granting petitioners' motion to dismiss, and the judgment entered thereon in favor of petitioners, is unreported.

The January 4, 2002, opinion as amended by the May 20, 2002, order has been republished at 291 F.3d 549.

JURISDICTION

The original opinion of the Ninth Circuit was filed January 4, 2002. Petitioners' timely petition for rehearing *en banc* was denied on May 20, 2002, and the Ninth Circuit's order amending the original opinion, and denying the petition for rehearing *en banc*, was filed and entered on that same date.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

1. U.S. Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 42 U.S.C. § 1983.

This statute concerns and is entitled "Civil action for deprivation of rights." It is set forth in App. D, infra, page 67a.

3. 18 U.S.C. § 1152.

This statute concerns crimes and Indians, and is commonly known as the "General Crimes Act." It is set forth in App. D, infra, pages 67a-68a.

4. 18 U.S.C. § 1153.

This statute also concerns crimes and Indians, and is commonly known as the "Major Crimes Act." It is set forth in App. D, infra, pages 68a-69a.

5. 18 U.S.C. § 1162.

This statute concerns State criminal law jurisdiction over criminal offenses committed by or against Indians in the Indian country within the six States identified in the statute. It does not address State criminal jurisdiction over criminal offenses committed off the reservation or otherwise outside of Indian country. This statute is commonly known as "Public Law 280," and its pertinent text is set forth in App. D, infra, pages 69a-71a.

STATEMENT OF THE CASE

In March 1999, the California State Department of Social Services sent to the Inyo County Department of Health and Human Services a report known as the "IEVS/Integrated Fraud Detection System Report." (Excerpts of Record ("ER") 136-A and 266.)

This report is generated by the State from payroll information submitted by employers throughout the State. In order to generate the report, the California Department of Social Services "matches" the employer-reported income against the income being reported by persons receiving State public welfare assistance. When a "mismatch" is discovered, that is, when the amount of wages being reported by employers is in excess of that being reported by the public assistance recipients, the "Integrated Fraud Detection System Report" is sent to the County administering the public assistance.

The Integrated Fraud Detection System Report sent to Inyo County advised that the Paiute Palace Casino, which is a gambling casino operated in Inyo County by respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, and by respondent Bishop Paiute Gaming Corporation (herein collectively referred to as "Paiute-Shoshone"), had reported on its State employer's quarterly payroll tax returns that it had paid certain income to three employees identified in the report, and that these three employees, who were recipients of California public assistance welfare benefits for the time period involved, had not reported such income on their welfare application forms.

In short, these three employees, identified in the Integrated Fraud Detection System Report as Patricia Dewey, Clifford Dewey, and Tinya Hill, were reported as having

earned income from Paiute-Shoshone, but had not reported that income to the State and County in connection with their (the employees') applications for public assistance welfare benefits, and in connection with the determination of the amount of their entitlement to those benefits.

After receipt of this information, the Inyo County Department of Health and Human Services notified the three employees of the discrepancies, and made requests that the employees reconcile the same. These requests were ignored.

The Department of Health and Human Services then forwarded the matter to the Inyo County District Attorney's Office for review, and the matter was assigned to DA Investigator Leslie Nixon, a California peace officer employed at the District Attorney's Office. After reviewing the files and matter, Investigator Nixon submitted her own requests to the three employees, asking that the income discrepancies be reconciled. Again these requests for reconciliation were ignored.

Thereafter, in what may in part be a disputed factual background (which is not controlling, however, with regard to the matters before the Court), Investigator Nixon sent a letter-request to the Paiute Palace Casino, asking for the relevant payroll information for the three casino employees who were the subject of the State's Integrated Fraud Detection System Report.

Although Paiute-Shoshone had in the past honored such informal requests without a search warrant, on this occasion, it advised that it would not release the requested

payroll information unless a search warrant was obtained.[1] This request did not appear entirely extraordinary, even though the informal letter-requests for information had been honored in the past, because on at least one other occasion, within the preceding year, the District Attorney's office had, after receiving an earlier California State IEVS/Integrated Fraud Detection System Report, requested similar payroll information from another tribal office, for a different employee, and been told that a search warrant would be required. In that case, the District Attorney's office had then obtained and served a similar search warrant, and the payroll records then at issue were obtained pursuant to the warrant.[2]

In any event, after her request to the casino for the subject payroll information was denied, Investigator Nixon submitted an affidavit in support of a petition for a search warrant to the California Superior Court. In summary, the affidavit advised of the IEVS/Integrated Fraud Detection System Report, and further provided that overpayment of benefit amounts in excess of $400.00 appeared to be in issue. The conduct being investigated, theft of public funds, was within the parameters of several California criminal statutes,

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[1] Paiute-Shoshone has not acknowledged that this representation of the need for a search warrant was made by its personnel.

[2] These facts appear to be in dispute in the following regard, but again, the disputed facts are not controlling: Respondent Paiute-Shoshone has not acknowledged the prior providing of similar payroll information pursuant to informal letter-request, nor has it acknowledged its prior honoring of a similar search warrant. Paiute-Shoshone alleges in its complaint that it had a long-standing policy not to release the information without a signed authorization from the employee involved. (ER 010).

including grand theft, a felony, in violation of California Penal Code § 487(a).[3]

Based on the affidavit, a search warrant was issued by the California Superior Court on March 23, 2000. The search warrant provided in pertinent part as follows:

> "The people of the State of California to any sheriff, constable, marshal, police officer, or to any other peace officer in the County of Inyo.
>
> "Proof by affidavit having been made this day before me . . . that the following ground or grounds for issuance of a search warrant exist:
>
> > "The property or things to be searched for consist of an item or items or constitute evidence which tend to show a felony has been committed or tend to show that a particular person has committed a felony,
>
> "YOU ARE THEREFORE COMMANDED to make a search in the daytime (7:00 a.m. to 10:00 p.m.) on and of the premises described as: Paiute Palace Casino located at 2742 North Sierra Highway 395, Bishop, Inyo County, California, for the following property: Payroll records for Patricia Dewey, date of birth 9-20-59, social security number 556-33-3889; Clifford Dewey, date of birth 11-27-54, social security number 558-98-0356; and Tinya Hill, date of birth 2-23-79, social security number 571-55-4327, for the period of April 1998 through June 1998, and if you find the same or any part thereof, to bring it forthwith as required by law before this court at 301 West Line Street, Bishop, California.
>
> "Given under my hand and dated, 3/23/00,
>
> "/s/ Patrick C. Canfield"
> (Excerpts of Record ("ER") 138-140)

[3] California Penal Code § 487(a) provides: "Grand theft is theft committed in any of the following cases: (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400). . . ."

Investigator Nixon then attempted to execute the search warrant at the casino. Upon arrival, however, she was told by Paiute-Shoshone that the warrant would not be recognized, that the casino was immune from search because Paiute-Shoshone was a sovereign government, and that although the records being sought by the search warrant were located in an out-building behind the casino, she (Investigator Nixon) was prohibited from searching for the records, and was being denied access to the out-building.

In order to mitigate the potential for disturbance, Investigator Nixon asked that the Sheriff's Department be called. Sheriff's deputies responded, and after reviewing the warrant, advised that it appeared proper. Paiute-Shoshone continued to deny the request for the key to the padlock securing the out-building, and accordingly, bolt cutters were used to cut the padlock. Investigator Nixon then searched the out-building, and the records described in the search warrant were located and obtained. (ER 267-328). Those records were then made the subject of a proper Return on the search warrant, and the same was filed with the Superior Court. (ER 263-264)

The records obtained were of two types. The first type consisted of individual pages of computer records showing the hours worked, and compensation paid, for each of the three persons identified in the search warrant, for the time period specified in the warrant. The second type consisted of the portion of Paiute-Shoshone's employer's payroll tax returns that involved the reported wages of the three subject casino employees, as submitted to the State of California, for the time period specified in the search warrant.

Care was taken by Investigator Nixon to obtain only specific pages of records that actually contained the name and information pertaining to at least one of the three subjects identified in the search warrant. Thus, each page of information obtained contained information for one or more of the three subjects. [4]

Paiute-Shoshone thereafter filed this action in District Court, seeking declaratory and injunctive relief, and also

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[4] Respondents have contended that the scope of the search exceeded that allowed by the warrant, because the computer lists of names on the pages seized contained information pertaining not only to the three subjects of the warrant, but also to other employees whose names were close in alphabetical order to the subjects' names, and therefore listed on the same page. Paiute-Shoshone therefore claimed that the "personnel records" of the other employees listed on these pages were improperly seized. The District Court rejected this argument, and stated: "Having reviewed the payroll records that were seized during the execution of the warrant, the court finds that the execution of the search warrant was within the warrant's scope because each page contained at least one reference to the employees that were under investigation." (App. page 58a; ER 217; and ER 267-328, consisting of a copy of each of the actual pages seized.)

seeking monetary damages for violation of its claimed Fourth Amendment rights pursuant to 42 U.S.C. § 1983. Attorneys fees and costs pursuant to 42 U.S.C. § 1988 were also sought. (ER 005-023).

In August 2000, petitioners Inyo County, Mr. McDowell and Sheriff Lucas filed their motion for dismissal of the complaint pursuant to F.R.C.P. § 12(b)(6).

On November 22, 2000, the District Court filed its Order Granting Defendants' Motion to Dismiss, and judgment was entered in favor of petitioners Inyo County, Mr. McDowell and Sheriff Lucas on that same date. (App., infra, pages 44a-66a).

Respondent Paiute-Shoshone timely appealed the District Court's order and judgment entered thereon, and on January 4, 2002, the Ninth Circuit filed its initial opinion, reversing the District Court's judgment entered in favor of petitioners. (App., infra, pages 9a-43a).

Inyo County, Mr. McDowell and Sheriff Lucas then timely filed a petition for rehearing en banc, and on May 20, 2002, the Ninth Circuit entered its order denying the petition for rehearing, and amending its earlier opinion. (App., infra, pages 1a-8a).

REASONS FOR GRANTING THE PETITION

The opinion of the Ninth Circuit in this case establishes at least hundreds, and perhaps many more, Indian tribal enclaves that are now sanctuaries where evidence of off-reservation (as well as on-reservation) criminal enterprise may rest, immune from search by law enforcement officers who are investigating the violation of off-reservation State crimes, even when those law enforcement officers have obtained a search warrant satisfying the probable cause requirements of the Fourth Amendment.

These enclaves are tribal commercial gambling casinos, which are proliferating throughout the nation,[5] other tribal operated businesses such as ski resorts, the offices of Indian tribal agencies, and other tribal offices and properties, located throughout the various reservations and other Indian country within the States of the Ninth Circuit. These include, of course, legal cases of the Ninth Circuits California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, and Hawaii, as well as within Guam and the Northern Mariana Islands.

The asserted legal basis of the Ninth Circuit's opinion which is *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), is so broad that it includes within its parameter the prohibition of even federal law-enforcement officers from obtaining search warrants for tribes, tribal businesses and tribal offices when investigating and prosecuting State crimes under the General Crimes Act, and under the Major Crimes Act, which are set forth at 18 U.S.C. Sections 1152 and 1153, respectively.

The effect of the Ninth Circuit's opinion regarding tribal sovereign immunity on federal law enforcement, investigation of federal crimes, is unclear, but this may also be impacted.

In issuing this opinion, the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. The Ninth Circuit has also decided an important federal question in a way that conflicts

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[5] According to its Website, even Harroh's Entertainment, Inc., a major corporation traded on the New York Stock Exchange, now operates large Indian gambling casinos and resorts on Indian reservations in the Ninth Circuit, and well as elsewhere in the nation.

in principle, if not directly, with relevant decisions of this Court. Moreover, the decision below is incorrect.

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The primary question presented concerns whether the doctrine of tribal sovereign immunity enables Indian tribes, and their gambling casinos and other tribal businesses, to prohibit searches of their property for criminal evidence of off-reservation State crimes, when the search is pursuant to a search warrant issued on probable cause in accordance with Fourth Amendment standards. [6] This important question of federal law has not been, but should be, settled by this Court.

Tribal sovereign immunity is "immunity from suit." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 757 (1998). *Turner v. United States*, 248 U.S. 354 (1919). It developed "almost by accident." *Kiowa Tribe of Oklahoma, supra*, page 756. The *Turner* case, *supra*, which is the authority upon which tribal sovereign immunity relies for its existence, has recently been described by the Court as "but a slender reed for supporting the principle of tribal sovereign immunity." *Kiowa Tribe of Oklahoma, supra,* page757.

There is no Supreme Court or other Court of Appeals precedent known to petitioners that has ever extended the

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[6] To the extent that any decision and supporting analysis by the Supreme Court is also applicable to on-reservation State crimes, that question may also be answered.

doctrine of tribal sovereign immunity - immunity from suit - to immunity from search for criminal evidence pursuant to a search warrant where the state has the jurisdiction to prosecute the crime involved. Indeed, there is no Supreme Court precedent known to petitioners that has ever even intimated such.

Further, even the continued viability of the doctrine of tribal sovereign immunity, with regard to immunity from suit, in today's "wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities," is being questioned. *Kiowa Tribe of Oklahoma, supra*, page 757-758.

The Supreme Court recently observed:

> "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); *Potawatomi, supra*; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have

> no choice in the matter, as in the case of tort victims." *Kiowa Tribe of Oklahoma, supra*, page 758.

Despite this current questioning of the continued viability of tribal sovereign immunity, even in its traditional role of immunity from civil suit, the Ninth Circuit's opinion herein has decided an important question of federal law in such a manner as to extend the principle of tribal sovereign immunity to non-civil, that is, criminal matters, and thereby enable the multitude of Indian tribes in the Ninth Circuit, and their gambling casinos and other businesses, to prohibit the searching of their property for criminal evidence pertaining to off-reservation (and on-reservation) commission of State crimes, even when the search is pursuant to a search warrant, issued upon probable cause, satisfying the Fourth Amendment standards for the same. (App., infra, pages 21a-24a).

This opinion by the Ninth Circuit is broad enough to include within its parameters the holding that Indian tribes, their casinos and businesses are immune from search for criminal evidence even when the search is undertaken by federal law-enforcement officers in their investigation of State crimes committed on a reservation, in States subject to the General Crimes Act and Major Crimes Act (18 U.S.C. Sections 1152 and 1153, respectively).

This breadth of scope of the Ninth Circuit's opinion flows from its analysis which led to its decision in this case. The Ninth Circuit's analysis is, in summary, as follows: In 1992, the Ninth Circuit decided the case of *United States v. James*, 980 F.2d 1314 (9th Cir. 1992). In *James*, the Ninth Circuit held that the Quinault Indian Nation was immune from service of a federal subpoena, for a tribal-clinic's psychological records of an Indian victim/patient, when that subpoena was requested by the Indian defendant being

prosecuted for the on-reservation rape of the Indian victim/patient. The defendant was being prosecuted by the federal government, for violation of the State's criminal law, pursuant to the Major Crimes Act, 18 U.S.C. § 1153.

In *James*, *supra*, the Ninth Circuit held that the tribe could assert tribal sovereign immunity against the federal subpoena, and thereby avoid having to comply with the federal subpoena.

In this case, the Ninth Circuit used the *James*-case proclaimed right that a tribe could assert sovereign immunity to refuse to honor a federal subpoena, in connection with a federal prosecution under 18 U.S.C. 1153, of an on-reservation State crime and held that this obviously means that tribes also have the right to assert tribal sovereign immunity in order to bar a search pursuant to a State (not federal), search warrant (not subpoena), issued in connection with a State (not federal), prosecution or investigation under State law (not 18 U.S.C. 1153), to search for evidence of off-reservation (not on-reservation), State crime.

Thus, the Ninth Circuit's analysis jumps from allowing tribal prohibition of federal subpoenas regarding State crime prosecution by the federal government for on-reservation crime; through tribal prohibition of federal search warrants regarding State crime prosecution by the federal government for, apparently, both on-reservation and off-reservation crime; and then to tribal prohibition of State search warrants regarding State crime prosecution by the State for off-reservation crime.

The Ninth Circuit's opinion in this case is so broad that it includes within its prohibitions searches, pursuant to a search warrant, of tribes and their casinos and other businesses in Public Law 280 States (18 U.S.C. Section 1162), by State law enforcement officers investigating

on-reservation State crimes. In Public Law 280 States, of course, congress has statutorily returned State criminal law jurisdiction on the reservation to the States identified in the statute. California is one of the States identified in the statute.

In summary, the decision of the Ninth Circuit in this case has such far reaching consequences, and is of such national importance, that the rule of law regarding immunity from search pursuant to search warrant must be settled by this Court.

There are nine Western states, along with Guam and the Northern Mariana Islands, now known to be geographical areas where tribal storage of books, records, and other evidence and instrumentalities of crime are protected from search by law enforcement investigators, even when a search warrant has been obtained. At present, such storage is subject only to whatever private arrangements might be made with the managing personnel of the tribe storing the same.

This state of affairs cannot, respectfully, be allowed to stand. A society that declines to protect itself and its citizens from off-reservation (as well as on-reservations) crimes, by establishing hundreds of enclaves which may be used as sanctuaries for criminal evidence, will not long survive as one supported by its citizens.

There is no precedent calling for or supporting the Ninth Circuit's extension of the doctrine of tribal sovereign immunity to enable tribes, their gambling casinos and other businesses to prohibit searches of their property for evidence of off-reservation crimes, especially when that search is pursuant to a search warrant issued upon probable cause.

It is respectfully urged that this petition be granted, and this important question of federal law be settled by this Court.

II. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS IN PRINCIPLE, IF NOT DIRECTLY, WITH RELEVANT DECISIONS OF THIS COURT.

Additionally, the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. These include *Nevada v. Hicks,* 533 U.S.353 (2001), the "Montana analysis" as presented in *Montana v. United States*, 450 U. S. 544 (1981), and *United States v. Wheeler*, 435 U.S. 313 (1975).

Petitioners Inyo County, Mr. McDowell and Sheriff Lucas filed their answering brief with the Ninth Circuit in this case on June 21, 2001. This was just four days prior to this Court's decision in *Nevada v. Hicks, supra*.

In their pre-*Nevada v. Hicks*, brief, petitioners argued extensively that the correct framework for decision in this matter was the analysis set forth in *Wheeler* and *Montana supra*, and the line of cases related thereto. Petitioners argued that the inherent sovereignty of Indian tribes is limited, and quoted the following:

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty'... Their incorporation within the territory of the United States and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *United States v. Wheeler*, 435 U.S. 313, 323 (1978)

> "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by [1] treaty or [2] statute, or [3] by implication as a necessary result of their dependent status. *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L.Ed.2d 209." *United States v. Wheeler, supra,* 323.
>
> "These limitations [of sovereignty] rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. _____ (2001), at p. 5 of the Opinion of the Court; *United States v. Wheeler, supra,* 326; *Montana v. United States, supra*, 564.
>
> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe. *Montana v. United States, supra*, 564; *United States v. Wheeler, supra*, 326.
>
> "Although physically within the territory of the United States and subject to ultimate federal control, [Indian tribes] ... remain 'a separate people, with the power of regulating their internal and social relations.' *United States v. Kagama, supra*, 118 U.S., at 381-382...." *United States v. Wheeler, supra*, 322 .
>
> "... Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with

the dependent status of the tribes, and so cannot survive without express congressional delegation. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 ...; *United States v. Kagama*, 118 U.S. 375, 381-382...." *Montana v. United States, supra,* 564.

"... The powers of self-government [of Indian tribes] ...involve only the relations among members of a tribe." *Montana v. United States, supra,* 564 (Emphasis by Court); *United States v. Wheeler, supra*, 326.

"... the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status." *Oliphant v. Suquamish Indian Tribe, et al., supra,* 208 (1978).

"Indian reservations are 'a part of the territory of the United States.' [Citation.] Indian tribes 'hold and occupy [the reservations] with the assent of the United States and under their authority.' [Citation.] Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant v.*

Suquamish Indian Tribe, et al., supra, 208-209 (1978). (Emphasis added.)

In their pre-*Nevada v. Hicks* brief to the Ninth Circuit, petitioners went on to state that when applying the foregoing principles of inherent sovereignty to the question in this case, which is whether the Paiute-Shoshone have retained sovereignty to enable them to bar the execution of a search warrant for evidence pertaining to crimes against the people of the State of California (here, again, theft of public funds), it was respectfully urged that it was clear that the Paiute-Shoshone did not have such retained sovereignty.

Then, four days after petitioners' filed their answering brief, this Court released the decision in *Nevada v. Hicks, supra*, which employed the same analysis of *Montana* and *Wheeler* as did petitioners to reach the conclusion that States have the inherent jurisdiction to enter a reservation, for criminal law enforcement purposes, regarding crimes committed off the reservation, and to serve process (specifically search warrants) in connection therewith.

The Supreme Court stated in *Hicks*:

"[T]he principal that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.' *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 156, 100 S.Ct. 2069 . . .

* * * *

"While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation

(including Indian fee lands) for enforcement purposes, several of our opinions point in that direction . . . .

* * * *

"We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process [search warrants] related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations - to 'the right to make laws and be ruled by them.' The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government." *Nevada v. Hicks*, 533 U.S. 353, 364. (emphasis added)

The forgoing analysis and holding of the Supreme Court was brought to the attention of the Ninth Circuit in written briefing prior to oral argument, and was even addressed by Paiute-Shoshone in its reply brief. *Nevada v. Hicks* was also specifically brought to the attention of the Ninth Circuit at oral argument. Notwithstanding this, however, the Ninth Circuit declined to address or even mention *Nevada v. Hicks* in its opinion (App., 9a-43a).

In fact, in its opinion, the Ninth Circuit appears, at least to petitioners, to hold directly contrary to the Supreme Court in *Nevada v. Hicks*, when the Ninth Circuit holds:

> "We conclude that the execution of a search warrant against the Tribe interferes with 'the right of reservation Indians to make their own

> laws and be ruled by them.'" (emphasis added) (App., 20a).

The Ninth Circuit then asserts that *United States v. James, supra*, 980 F.2d 1314 (9th Cir. 1992), affirming the quashing of a federal subpoena, is authority for this holding. Again, there is no attempt to reconcile or distinguish *Nevada v. Hicks*.

Subsequently, in their petition for rehearing *en banc* to the Ninth Circuit, petitioners presented extensive briefing on *Nevada v. Hicks,* and on the *Montana* analysis leading to the *Hicks* decision. The Ninth Circuit was also briefed on the statements made by the Supreme Court in *Hicks* at page 365 of the decision, that although the states' inherent jurisdiction on reservations could be stripped by Congress, that has not happened with regard to the service of search warrants for criminal evidence pertaining to off-reservation crime, and further, that:

> "Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation." *Nevada v. Hicks, supra,* page 366.

The Ninth Circuit was also briefed on the Supreme Court's holding that:

> "'[T]he State's interest in execution of process is considerable' enough to outweigh the tribal interest in self-government' even when it relates to Indian-fee lands.'" *Nevada v. Hicks, supra*, page 370;

and that:

> "We do not say State officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Nevada v. Hicks, supra,* page 373. (emphasis added)

Despite this extensive briefing, however, once again, in its decision to deny the rehearing *en banc*, and otherwise amend its prior opinion, the Ninth Circuit declined to comment upon the holdings of *Nevada v. Hicks*.

By way of the foregoing, the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Accordingly, the Court should grant the petition herein, and address the issue of the propriety of service of search warrants on Indian tribes, their gambling casinos and other tribal businesses.

III. THE DECISION BELOW IS INCORRECT.

The opinion of the Ninth Circuit is incorrect in several key areas with respect to the questions presented by this petition.

A. Incorrect on Search Warrant Issue.

1. States have inherent jurisdiction to serve process on the reservation with regard to off-reservation State crimes.

As discussed above, in *Nevada v. Hicks, supra*, this Court recognized that States have inherent jurisdiction to serve process (search warrant) upon a reservation with regard to off-reservation crimes, and that congress has not taken this jurisdiction away. Specifically, the Court stated:

> "The States' inherent jurisdiction on reservations can of course be stripped by Congress, *see Draper v. United States*, 164 U.S. 240, 242-243, 17 S.Ct. 107, 41 L.Ed. 419 (1896). But with regard to the jurisdiction at issue here that has not occurred ... Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation. To the contrary, 25 U.S.C. § 2806 affirms that 'the provisions of this chapter alter neither ... the law enforcement, investigative, or judicial authority of any ... State, or political subdivision or agency thereof....'"
>
> *Nevada v. Hicks, supra,* 365-366.

Accordingly, the Ninth Circuit is in error by failing to similarly recognize this inherent jurisdiction of the States.

2. The Supreme Court has held that execution of a search warrant upon a reservation, with regard to evidence of off-reservation State crimes, does not infringe upon a tribe's right to self-governance.

The Ninth Circuit held in its opinion that the execution of a search warrant against the tribe interfered with "the right of reservation Indians to make their own laws and be ruled by them." (App., 20a).

However, the Supreme Court has held that:

> ". . . tribal authority to regulate state officers in executing process [search warrants] related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations - to 'the right to make laws and be ruled by them.' The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government." *Nevada v. Hicks*, 533 U.S. 353, 364.

There is, of course, a factual distinction in the *Hicks* case, when reviewed in light of the Ninth Circuit's opinion below. That distinguishing fact is that in *Hicks*, the search warrant was served at the on-reservation residence of a tribal member, and in this case, the search warrant was served at the tribe's on-reservation commercial gambling casino.

However, given that (1) this Court has declared that there is no "tribal authority to regulate state officers in executing process [search warrants] related to the violation, off reservation, of state laws," and (2) that States have inherent jurisdiction to do so, and that such jurisdiction has not been taken away by congress, and (3) that heretofore tribal sovereign immunity (to suit) has never been extended so as to enable a tribe to prohibit the search of its property for criminal evidence of off-reservation State crime, it is submitted that there is no tribal sovereign immunity to bar law enforcement's search, pursuant to search warrant, of tribal and tribal casino and other business property, for criminal evidence of off-reservation (or on-reservation, for that matter) State crime.

B. Incorrect on Holding that Tribe as a Sovereign has Actionable claim Under 42 U.S.C § 1983.

1. <u>The tribe, as a sovereign and in its sovereign capacity, is not a "citizen or other person", Under 42 U.S.C. § 1983.</u>

The tribe is of course suing as a sovereign. Indeed, it's whole suit is based on asserted tribal sovereignty immunity. The Ninth Circuit has recently acknowledged that a tribe is not a citizen of any state of the United States. *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1092, 1096-1097 (9th Cir. 2002). In that case, the Ninth Circuit also cited with its approval the opinion of Ninth Circuit Judge Betty Fletcher in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16, (9th Cir 1987) that:

> **"[I]t is doubtful whether [a] Tribe qua sovereign would qualify as a 'citizen of the United States or other person' eligible to bring an action under § 1983 for deprivation of rights, privileges or immunities. [citations.]"** *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16 (9th Cir 1987); *American Vantage Companies, Inc. v. Table Mountain Rancheria, supra*, n. 4, 1097. (emphasis added)

The tribe, as a sovereign and in its sovereign capacity (which is clearly the capacity in which it brings this suit and asserts sovereign immunity) is not a citizen or other person within the meaning of 42 U.S.C. § 1983, and therefore it does not qualify as a "citizen or other person" eligible to bring an action under 42 U.S.C. § 1983.

2. The rights of the tribe allegedly violated - the right to self governance, and to tribal sovereign immunity - are not constitutional or federal statutory rights, and thus any violation of them would not support a cause of action under 42 U.S.C. § 1983.

Neither the right to self-governance, nor the claimed right to assert sovereign immunity as a bar to the execution of the search warrant, are statutory or constitutional rights. As such, they cannot support a Section 1983 claim. This is because it is well established that in order to prevail in a Section 1983 claim, the government official must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Ninth Circuit has already acknowledged this in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), where the Ninth Circuit holds that interfering with or impairing an Indian tribe's right to self-governance is not a protected interest under Section 1983, and will not support a claim for Section 1983 damages. This is, again, because a tribal right to self-governance is not based upon federal constitutional or statutory law.

The Ninth Circuit attempts, however, in its opinion below, to "bootstrap" the service of the search warrant into a Fourth Amendment violation, that in turn supports a § 1983 claim, by stating that since the search was unlawful as a violation of tribal sovereign immunity (which will not support a § 1983 claim), it was an unlawful search, and therefore, it was a Fourth Amendment violation, that in turn supports a § 1983 claim.

However, even accepting the panel's view that the search was unlawful, the only thing that makes the search

unlawful (for it was with search warrant, and there was probable cause for its issuance, etc.) is that the search was made in violation of the alleged "primary right" of tribal sovereign immunity, or the right to self governance, neither of which itself will support a § 1983 claim.

3. California law does enable the issuance of a search warrant by a superior court judge or other magistrate for a search of property outside the jurisdiction of the county where the magistrate sits.

Finally, the Ninth Circuit is incorrect in its explanation that California law prohibits a magistrate from issuing a search warrant for a search outside of the county where he/she sits (and in any event, it is not disputed that the Paiute Palace Casino is in Inyo County).

California Penal Code § 1528 permits the magistrate to issue a search warrant to "a peace officer in his or her county" which includes, of course the County Sheriff or his deputies or District Attorney Investigators who are peace officers (such as in the case here).

Further, the California Supreme Court has held, after a complete examination and analysis of Penal Code §§ 1528, 1529, 830.1, and other applicable statutes, that a magistrate has jurisdiction even to issue an out-of-county search warrant when he/she "has probable cause to believe that the evidence sought relates to a crime committed within his county." *People v. Fleming* (1981) 29 Cal.3d. 698, 703-706.

The Fleming Court further held that pursuant to Penal Code § 830.1, the authority of the peace officer "extends to any place within the state ... [a]s to any public offense committed or which there is probable cause to believe has been committed within the political subdivision which employs him." *People v. Fleming, supra*, page 704.

Thus, contrary to the believe of the Ninth Circuit, there is no extraterritorial jurisdiction being asserted by the Sheriff, or District Attorney Investigator, all of whom are peace officers employed by the County of Inyo, and whose authority extends to "any place within the state" with regard to the grand theft crime committed, or for which there was probable cause to believe had been committed, in Inyo County.

C. Incorrect in Denial of Qualified Immunity Defense to District Attorney and Sheriff - The Law, if it is Held to Exist, Prohibiting the Execution of Search Warrants on Tribal Property, was not Clearly Established so as to Deny the Defense of Qualified Immunity.

Finally, with regard to the Ninth Circuit's denial of the defense of qualified immunity, it is, as previously stated, well established that in order to prevail in a § 1983 claim, the government official must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). If there is no such clearly established right, the officer is entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Here, even if there was § 1983 cognizable violation of a tribe's right to self-governance or tribal sovereign immunity be free from search, such right was not so clearly established so as to deny the defense of qualified immunity.

The following serve as examples of the state of the law re search warrants and subpoenas regarding Indian tribes at the time of the execution of the warrant in this case: In *Crow Tribe of Indians, et al. v. Racicot, et al.*, 87 F.3d 1039 (9th Cir. 1996), the service of a search warrant upon the Crow Tribe's casino was challenged and upheld as lawful; in *United*

States v. James, 980 F.2d 1314 (9th Cir. 1992), the service of a FRCRP 17 subpoena by a defendant to his alleged rape victim was quashed as being in violation of the tribe's sovereign immunity; in *United States v. Snowden*, 89 F.Supp. 1054 (D. Oregon 1995), under almost identical circumstances as *James*, the District Court refused to follow *James*, finding that the constitutional rights of the accused were not considered in *James*, and that the constitutional rights of the accused outweighed the tribe's claim of sovereign immunity in the counseling records, and the subpoena was not quashed; and in *United States v. Verlarde,* 40 F.Supp.2d 1314 (D. New Mexico 1999), once again under almost identical circumstances as *James*, the court again went through an extensive analysis of *James* and *Snowden*, and found that the constitutional rights of the accused, and the federal government's overriding sovereign authority, "trumped" the tribe's claim of sovereign immunity in the counseling records, and once again the subpoena was not quashed.

Further, all of these cases, leading to inconsistent results, were similar in that they all involved alleged violations of federal and/or state law occurring on the reservation. This would be confusing enough to a peace officer on the street; let alone add the fact that there was no case that, like this one, addressed the issue of off-reservation State crime.

Under these varied circumstances, it respectfully and simply cannot be said that all reasonable officers would have known that obtaining and/or execution of a search warrant, issued by a magistrate on probable cause, was unlawful under the circumstances alleged.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN DOUGLAS KIRBY
Counsel of Record

LAW OFFICES OF JOHN D. KIRBY
A Professional Corporation
9747 Business Park Avenue
San Diego, California 92131
(858) 621-6244

PAUL N. BRUCE,
COUNTY COUNSEL
COUNTY OF INYO
(760) 878-0229

Counsel for Petitioners

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15007

[Filed May 20, 2002]

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; Bishop Paiute Gaming Corporation, d.b.a. the Paiute Palace Casino,

Plaintiffs-Appellants,

v.

COUNTY OF INYO; Phillip McDowell, individually and in his official capacity as District Attorney of the County of Inyo; Daniel Lucas, individually and in his official capacity as Sheriff of the County of Inyo,

Defendants-Appellees.

Before: PREGERSON and RAWLINSON, Circuit Judges, and WEINER,[1] District Judge.

ORDER AMENDING OPINION AND DENYING THE PETITION FOR REHEARING AND THE SUGGESTION FOR REHEARING EN BANC

The opinion filed January 4, 2002, 275 F.3d 893 (9th Cir. 2002), is amended as follows:

Starting at page 910, delete Section VII in its entirety and replace it with the following:

VII. THE DISTRICT ATTORNEY AND THE SHERIFF ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The Tribe further asserts claims against the District Attorney and the Sheriff in their individual capacities. The Eleventh Amendment does not bar § 1983 claims against county officers sued in their individual capacities. *Hafer v. Melo,* 502 U.S. 21, 25-27, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991); *Demery v. Kupperman,* 735 F.2d 1139, 1146 n. 3 (9th Cir. 1984).

The District Court correctly held that neither the District Attorney nor the Sheriff are entitled to absolute immunity. However, the District Court erroneously concluded

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[1] Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

that the District Attorney and Sheriff were entitled to qualified immunity.

Qualified immunity "shields [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Behrens v. Pelletier,* 516 U.S. 299, 305, 513 U.S. 1142, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). Our analysis of whether the defendants are entitled to qualified immunity follows a two-part test: (1) whether the facts taken in the light most favorable to the plaintiff would establish a violation of the Fourth Amendment; and, if so (2) whether the law was clearly established at the time such that a reasonable officer faced with the same circumstances would have known that the challenged conduct was unlawful. *See Robinson v. Solano County,* 278 F.3d 1007, 1013 (9th Cir. 2002) (en banc) (citing Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001)). We conclude, taking the facts in the light most favorable to the Tribe, that the search violated the Fourth Amendment, and that the law in this Circuit was clearly established at the time the search was executed such that it would have been clear to the District Attorney and Sheriff that their conduct was unlawful.

The Tribe has alleged a violation of the Fourth Amendment based on the District Attorney's and Sheriff's execution of a search warrant to seize tribal property (employee records) on tribal land. The Tribe contends that the search was unlawful because it was executed beyond the

District Attorney's and Sheriff's jurisdiction. James is the leading case in our Circuit involving seizure of tribal property. *United States v. James,* 980 F.2d 1314 at 1319. In James, we held that a U.S. district court did not err when it quashed a subpoena ordering a tribe to release its documents because the tribe possessed tribal immunity. *Id.* Our holding in James was based on the conclusion that "Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the [federal] court ...." *Id.* Accordingly, we found no "jurisdictional grant" from Congress which would require the tribe to produce documents in a criminal prosecution against an individual Indian.[2]

In James, we did not need to reach the issue whether the subpoena was lawful because it was never executed. Instead, we affirmed the district court's decision not to enforce the subpoena on the ground that the officers had no jurisdictional authority over the tribe. *James,* 980 F.2d 1314. In the present case, the search warrant was executed but, as in James, the officers still had no jurisdictional authority to do so. Thus, based on the principles set forth in James, we conclude that the search warrant was in violation of the Fourth Amendment because the officers acted beyond their

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[2] In James, the federal officers had authority to prosecute an individual Indian for violations of federal criminal laws under 18 U.S.C. § 1153. In the instant case, the county officers had authority to prosecute the individual Indians for violation of state welfare laws under Public Law 280. Under neither of these statutes did prosecutorial jurisdiction extend to tribes as sovereign entities. *See* Sect. B.II.

authority when they executed the search warrant against the Tribe and in excess of their jurisdiction.

Whether the execution of a search warrant against tribal property is constitutional was addressed in *Sycuan Band of Mission Indians v. Roache,* 788 F. Supp. 1498, 1508 (S.D. Cal. 1992), aff'd on other grounds, 54 F.3d 535, 543-44 (9th Cir. 1995). In Sycuan Band, the San Diego County Sheriff's deputies executed a search warrant on the Sycuan, Barona, and Viejas Reservations and seized gaming devices, cash, and records owned by the tribes. *Sycuan Band,* 788 F. Supp. at 1501.[3] The district court held that the search warrants were invalid because the state did not have jurisdiction over the tribes and "the defendants, therefore, acted beyond their authority by executing the ... search warrants." *Id.* at 1508. In reaching its conclusion, the district court affirmed the general principle that "a judicial officer's writ cannot run outside the officer's jurisdiction." *Id.* (citing *United States v. Strother,* 188 U.S. App. D.C. 155, 578 F.2d 397, 399 (D.C. Cir. 1978)).

Our conclusion that the county officers' conduct was in violation of the Fourth Amendment is buttressed by a

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[3] As in the present case, the search warrant was executed against the tribes in order to obtain information as part of a criminal investigation against individual Indians. In Sycuan Band and the present case, the officers had authority to enforce criminal law against individual Indians under Public Law 280, but did not have authority to enforce those criminal laws against tribes as sovereign entities.

closely analogous case from the Tenth Circuit. In *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), a county sheriff executed a search warrant on tribal property. The court held that because it was undisputed that the property was on tribal land and the state had never obtained jurisdiction over such lands, the search warrant was in violation of the Fourth Amendment. *Id.* at 1147.

In light of James and Sycuan Band, and the Tenth Circuit's conclusion in Baker, we hold that the District Attorney and Sheriff violated the Fourth Amendment when they executed the search warrant to seize tribal property held on tribal land because both the Tribe's property and land were outside the District Attorney's and Sheriff's jurisdiction. We further hold that this Fourth Amendment violation may merit relief under § 1983.[4]

Having concluded that the Tribe has alleged a violation of the Fourth Amendment, we turn to consider whether it would have been clear to the District Attorney and

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[4] Our conclusion that the Tribe may bring a 42 U.S.C. § 1983 action against the District Attorney and the Sheriff based on a search warrant executed in excess of the county officers' jurisdiction, is not precluded by *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989). Hoopa Valley held that the right to tribal self-government is not a protected interest under § 1983. The present case involves protection from an unlawful search and seizure. Here, the county officers had no jurisdiction to execute the search warrant and seize tribal property and, therefore, the search warrant violated the Fourth Amendment.

Sheriff at the time the warrant was executed that their conduct was unlawful. The conduct occurred in 2000, and so the law at that time must be our guide. *Robinson*, 278 F.3d at 1015.

As the foregoing discussion reflects, at the time the District Attorney and Sheriff obtained and executed a warrant, the law was clear in this Circuit that there was no jurisdictional grant authorizing county officers to search and seize tribal property as part of a criminal prosecution of an individual Indian. *See James*, 980 F.2d at 1319. Indeed, the only court in this Circuit to address the precise question whether the execution of a search warrant against tribal property is constitutional held that it was not. *See Sycuan Band*, 788 F. Supp. at 1508. Moreover, the only circuit to address this issue concluded -- seemingly without debate -- that such a warrant would violate the Fourth Amendment. *See Baker*, 894 F.2d 1144. Accordingly, we find that no reasonable officer could have concluded that he had jurisdiction to search and seize tribal property as part of a criminal prosecution of an individual Indian, and no reasonable officer could have concluded that the lack of jurisdiction was a mere technicality.

We hold as a matter of law that a reasonable county officer would have known, at the time the warrant was executed against the Tribe, that seizing tribal property held on tribal land violated the Fourth Amendment because the property and land were outside the officer's jurisdiction. Thus, the District Attorney and Sheriff are not entitled to qualified immunity.

Ninth Circuit Order Amending Opinion and Denying the Petition for Rehearing and the Suggestion for Rehearing En Banc - 5/20/02

With this amendment, the panel has voted to deny the petition for rehearing. Judges Pregerson and Rawlinson vote to deny the suggestion for rehearing en banc and Judge Weiner so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[January 4, 2002, Filed]

No. 01-15007

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; BISHOP PAIUTE GAMING CORPORATION, d.b.a. the PAIUTE PALACE CASINO,
Plaintiffs-Appellants,
v.
COUNTY OF INYO; PHILLIP MCDOWELL, individually and in his official capacity as District Attorney of the County of Inyo; DANIEL LUCAS, individually and in his official capacity as Sheriff of the County of Inyo,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
D.C. No. CV-00-6153-REC/LJO
Robert E. Coyle, Senior District Judge, Presiding

JUDGES: Before Harry Pregerson and Johnnie B. Rawlinson, Circuit Judges, and Charles R. Weiner,* District Judge. Opinion by Judge Pregerson.

OPINION

PREGERSON, Circuit Judge, On March 23, 2000, the District Attorney for the County of Inyo ("District Attorney") and the Sheriff for the County of Inyo ("Sheriff") obtained and executed a warrant to search Bishop Paiute Gaming Corporation ("Corporation") employee records held in the possession and control of the Bishop Paiute Tribe ("Tribe") in Bishop, California, as part of a welfare fraud investigation. The Tribe and the Corporation brought suit against the County of Inyo ("County"), the District Attorney, and the Sheriff (collectively "Defendants") under federal and state law seeking injunctive and declaratory relief, and damages under 42 U.S.C. § 1983.

The District Court granted Defendants' motion to dismiss on each of the Plaintiffs' claims. On appeal, the Tribe raises several arguments concerning the authority of the County to obtain and execute a search warrant against the Tribe. First, the Tribe argues that Public Law 280--which grants California criminal jurisdiction over offenses committed by or against Indians--does not waive the Tribe's sovereign immunity, and thus the County exceeded its jurisdiction when it obtained and executed a search warrant against the Tribe. The Tribe also argues that the Indian

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* The Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Gaming and Regulatory Act preempts any jurisdiction the State of California might have to apply and enforce California's laws against the Tribe. Further, the Tribe argues that California has no jurisdiction over Indian lands pursuant to Public Law 280 because the California legislature has not specifically enacted legislation accepting such jurisdiction. Finally, the Tribe asserts that Public Law 280 is invalid because the Tenth Amendment precludes Congress from directing California to assume criminal jurisdiction over Indian lands.

The Tribe also seeks damages under 42 U.S.C. § 1983 on the ground that the County and its agents violated the constitutional and civil rights of the Tribe when the District Attorney and Sheriff knowingly obtained and executed a search warrant in excess of their jurisdiction.

We find that the County and its agents violated the Tribe's sovereign immunity when they obtained and executed a search warrant against the Tribe and tribal property. We also find that the county District Attorney and Sheriff acted as county officers when they obtained and executed a search warrant over tribal property, thus subjecting the County to liability under 42 U.S.C. § 1983. Finally, we find that neither the District Attorney nor the Sheriff is entitled to qualified immunity because they violated clearly established law by executing a warrant outside of their jurisdiction. With respect to these conclusions, we reverse the District Court. With respect to the Tribe's remaining arguments concerning the County's authority to obtain and execute a warrant against the Tribe, we affirm the District Court.

A.

The Bishop Paiute Tribe ("Tribe") is a federally recognized tribe located on the Bishop Paiute Reservation in Bishop, California. The Bishop Paiute Gaming Corporation ("Corporation") is a tribally-chartered corporation wholly owned by the Tribe. The Corporation's sole purpose is to operate and manage Class II and Class III gaming, pursuant to a Tribal-State Compact, and under the legal authority of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. The gaming facility is known as the Paiute Palace Casino ("Casino").

Shortly after February 14, 2000, personnel for the Casino received a request from the County of Inyo District Attorney's Office for records of three tribal member Casino employees. The stated purpose for the records was the County's investigation into alleged welfare fraud. On February 28, 2000, the Tribe's attorney informed the District Attorney that it was the Tribe's long-standing policy that the information requested would not be released unless the Tribe was authorized to do so in writing by the employees whose records were sought.

On March 22, 2000, Leslie Nixon, a peace officer with the District Attorney's Office, executed an affidavit in support of the issuance of a search warrant. The affidavit stated that she had reasonable and probable cause for believing that the employees' records would demonstrate that the three individuals had committed welfare fraud by receiving public assistance while employed. The affidavit stated that the three individuals had received such public assistance through the Inyo County Department of Health and

Human Services during the period of April 1998 through June 1998.

Based on this affidavit, the Inyo County Superior Court issued a search warrant on March 23, 2000 authorizing a search of the Casino for the limited purpose of obtaining payroll records for the three tribal member Casino employees. The search warrant was executed that same day by the District Attorney for the County of Inyo, Phillip McDowell ("District Attorney"), and Sheriff for the County of Inyo, Daniel Lucas ("Sheriff"). Deadbolt cutters were used to cut locks off secured facilities containing confidential personnel records.

The District Attorney and Sheriff seized two types of payroll records: the first consisted of time card entries, payroll registers, and payroll check registers; the second consisted of quarterly payroll tax information which the Tribe had earlier submitted to the State of California in its California State Quarterly Wage and Withholding Reports.

Despite the limited scope of the search warrant, the documents seized contained confidential information concerning seventy-eight other tribal member Casino employees who were not the subject of the warrant, in addition to information concerning the named three individuals. The District Attorney and the Sheriff failed to give the Tribe an opportunity to redact from the seized records this information not specified or identified by the terms and conditions of the search warrant. Additionally, at the time of the search, the Tribe asserted that the state court did not have jurisdiction to enforce a warrant against a sovereign tribe.

Subsequent to July 13, 2000, the Tribe's attorney received correspondence from the District Attorney indicating that the County wished to obtain personnel records for six additional tribal member Casino employees for the period of July 1999 through July 2000. The Tribe's attorney informed the District Attorney that the Tribe would be willing to accept, as evidence of the employees' consent to release the information requested, a redacted copy of the last page of the signed county welfare application which indicated that the employment records of individuals applying for public assistance were subject to review by county officials. This offer was refused by the District Attorney.

The Tribe filed its complaint on August 4, 2000, seeking injunctive and declaratory relief and damages under 42 U.S.C. § 1983. On November 22, 2000, the District Court for the Eastern District of California granted Defendants' motion to dismiss. The District Court reached its decision on the grounds that: (1) the Tribe's sovereign immunity did not prohibit execution of the search warrant against the Tribe; (2) IGRA, which concerns gaming activities, does not preempt Public Law 280; (3) California was not required to enact enabling legislation before Public Law 280 became effective; (4) Public Law 280 does not violate the Tenth Amendment of the U.S. Constitution; (5) the District Attorney and Sheriff acted as state officers and thus the County is not liable for their conduct; and, (6) the District Attorney and Sheriff are entitled to qualified immunity and thus not liable in their personal capacities.

For the following reasons, we reverse the District Court order as to its conclusion that the Tribe's sovereign immunity was not violated by the issuance and execution of

the warrant, and as to the District Court's conclusion that the Tribe was not entitled to damages under 42 U.S.C. § 1983. As to the other conclusions reached by the District Court, we affirm.

B.

I. STANDARD OF REVIEW.

The Tribe challenges the District Court Order granting Defendants' Motion to Dismiss pursuant to Federal Rule 12(b)(6). We review the District Court's dismissal for failure to state a claim de novo. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998) (noting that" a complaint should not be dismissed unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). We review the issue of whether a tribe has sovereign immunity de novo. *Burlington N.R.R. Co. v. Blackfeet Tribe,* 924 F.2d 899, 901 (9th Cir. 1991). On review of a denial of a motion to dismiss based on qualified immunity, we have jurisdiction only to decide if defendant's conduct violated clearly established constitutional rights. *Pelletier v. Federal Home Loan Bank,* 968 F.2d 865, 871-72 (9th Cir. 1992).

II. THE SOVEREIGN GOVERNMENTAL STATUS OF THE TRIBE PREVENTS THE EXECUTION OF THE SEARCH WARRANT AGAINST THE TRIBE.

A. Public Law 280 Did Not Waive the Tribe's Sovereign Immunity.

This case requires this court to reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations. More particularly, we are asked to determine whether Public Law 280, 18 U.S.C. § 1162(a)--which granted several states criminal jurisdiction and limited civil jurisdiction over reservation Indians--can be read to infringe upon the sovereignty of Indian nations. An analysis of the jurisdictional reach of Public Law 280 necessarily must be taken against the backdrop of the Indian sovereignty doctrine. See *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 475, 48 L. Ed. 2d 96, 96 S. Ct. 1634 (1976).

The Supreme Court's jurisprudence regarding Indian sovereignty is governed by the "policy of leaving Indians free from state jurisdiction and control..." *Rice v. Olson,* 324 U.S. 786, 789, 89 L. Ed. 1367, 65 S. Ct. 989 (1945). The Supreme Court has viewed tribal sovereign immunity as a considerable shield against intrusions of state law into Indian country. See, e.g., *Williams v. Lee,* 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973).

Public Law 280 was adopted by Congress in response to the concern over the lawlessness on Indian reservations. *See Bryan v. Itasca County*, 426 U.S. 373, 379, 48 L. Ed. 2d 710, 96 S. Ct. 2102 (1976) (citing Carole Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 541-42 (1975). As such, the statute was designed to address the conduct of individuals rather than abrogate the authority of Indian governments over their reservations. Section 2 of the statute grants six states, including California, criminal jurisdiction over offenses committed by or against Indians on the reservations.[1] Notably, the statute makes no mention of jurisdiction over Indian tribes.

The denial of state jurisdiction over tribes is also consistent with the Supreme Court's canons of construction for Indian law cases. In interpreting the scope of Public Law 280, the Supreme Court has been "guided by that eminently sound and vital canon... that statutes passed for the benefit of dependent Indian tribes... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan*, 426 U.S. at 391, 392(citations omitted). Thus, any statutory ambiguity as to whether the State can enforce a warrant against the Tribe should be read to protect Indian sovereignty.

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[1] Section 2(a), codified at 18 U.S.C. 1162(a) provides: "(a) Each of the States... shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country... to the same extent that such State... has jurisdiction over offenses committed elsewhere within the State..., and the criminal laws of such State... shall have the same force and effect within such Indian country as they have elsewhere within the State..."

Reading the plain language of the statute and applying long-established canons of construction relevant to Indian law cases, the United States Supreme Court and the Ninth Circuit have interpreted Public Law 280 to extend jurisdiction to individual Indians and not to Indian tribes. *See Id.* at *389* (interpreting Public Law 280 and observing that "there is notably absent any conferral of state jurisdiction over the tribes themselves..."); *California v. Quechan Tribe of Indians,* 595 F.2d 1153, 1156 (9th Cir. 1979) (stating that "neither the express terms of [Public Law 280], nor the Congressional history of the statute, reveal any intention by Congress for it to serve as a waiver of a Tribe's sovereign immunity"). Absent a waiver of sovereign immunity, tribes are immune from processes of the court.[2]

Nevertheless, Defendants argue that in light of Supreme Court decisions that have described an inherent limitation on tribal sovereignty, Public Law 280 must be read to grant jurisdiction to the states to execute a search warrant over the Tribe. *See, e.g., United States v. Wheeler,* 435 U.S. 313, 323, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978) (holding that an Indian tribe retains jurisdiction to punish one of its members unless withdrawn by treaty, statute or implication as

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[2] The District Court wrongly found that Bryan was inapplicable authority on the ground that the case concerned Public Law 280's grant of civil jurisdiction as opposed to criminal jurisdiction. Because the provisions granting criminal and civil jurisdiction are identical, cases interpreting Public Law 280's provision granting civil jurisdiction are instructive for interpreting Public Law 280's provision granting criminal jurisdiction. Thus, both Bryan and Quechan Tribe provide precedential authority that Public Law 280 does not diminish tribal sovereignty.

a necessary result of their dependent status); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 211-12, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978) (holding that an Indian tribe's exercise of criminal jurisdiction over non-Indians is inconsistent with the domestic-dependent status of the tribes and that tribes may not assume such jurisdiction without congressional authorization). Defendants assert that because tribes are no longer possessed with the full attributes of a sovereign, it would be inconsistent with their dependent status to bar the state from executing a search warrant against tribal property.

However, all the cases relied upon by Defendants involve instances where a tribe's sovereignty has been limited after it attempted to exert jurisdiction over non-member Indians or in cases involving attempted exertion of jurisdiction over nontribal lands. This case involves the Tribe's assertion of jurisdiction over uniquely tribal property (Casino employee records) on tribal land. Thus, Defendants' assertion that the Tribe's inherent sovereignty has been lost by implication is not supported by law.

In sum, in enacting Public Law 280, Congress neither waived the sovereignty of the tribes, nor granted state jurisdiction over Indian tribes. Accordingly, we hold that Public Law 280 did not confer state jurisdiction over the Tribe.

B. Execution of a Warrant Against the Tribe Violates Tribal Immunity.

Defendants argue that the execution of a warrant against the Tribe does not offend their status as a sovereign

entity. The Tribe responds that their right to develop and enforce their internal tribal policies should be protected.

The Tribe established reasonable policies concerning the confidentiality of employee records, which in many instances were based on federal and state guidelines. The Tribe asserts that such policies are necessary to encourage truthfulness and accuracy in Casino employee records. As one of the only means by which the Tribe can generate income and be self-sufficient, management of the Casino is uniquely part of the Tribe's government and infrastructure. Indeed, all governments create policies and procedures for the protection of their records. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 *et seq.*; California Public Records Act, CAL. GOV'T CODE § 6250. Undoubtedly, California's sovereign immunity would be compromised if the United States demanded that the State follow procedures other than those adopted by the state policymakers. Moreover, at issue is not just the Tribe's right to protect the confidentiality of its employee records, but the more fundamental right of the Tribe not to have its policies undermined by the states and their political subdivisions. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334, 76 L. Ed. 2d 611, 103 S. Ct. 2378 (1983) (noting that "the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government..."). We conclude that the execution of a search warrant against the Tribe interferes with "the right of reservation Indians to make their own laws and be ruled by them." *Williams,* 358 U.S. at 220.

Defendants characterize the execution of the warrant against the Tribe as a "customary inconvenience "that would accompany the service on any business. However, this Circuit

has held that a subpoena issued against a tribe is different and cannot be enforced because of tribal immunity. *See United States v. James,* 980 F.2d 1314 (9th Cir. 1992). In James, the Indian defendant was prosecuted by the federal government for the crime of rape against another Indian pursuant to the grant of federal jurisdiction through the Indian Major Crimes Act, 18 U.S.C. § 1153. The defendant appealed his criminal conviction in part on the ground that the federal district court erred in quashing a subpoena that ordered the Quinault Tribe to release documents in its possession relating to the victim's alcohol and drug problem. *Id.* at 1319. In affirming the district court's order to quash the subpoena, the court noted that "Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is commenced" when it granted federal criminal jurisdiction over individual Indians for certain crimes pursuant to 18 U.S.C. § 1153. *Id.* at 1319. The court held that the Tribe was possessed of tribal immunity and thus the federal court lacked the jurisdiction to enforce a subpoena against an unwilling sovereign even though the federal government had jurisdiction to enforce federal criminal laws against individual Indians. *Id.* at 1319.

The ruling in James is directly relevant to our review of this case. The James Court correctly focused on the status of Indian tribes as sovereigns and denied the federal government the authority to compel disclosure of tribal documents. That the federal government may not pierce the sovereignty of Indian tribes, notwithstanding its constitutionally preemptive authority over Indian affairs, *see* U.S. CONST. art. I, § 8, carries considerable weight in our review of this case.

The District Court distinguished James on two grounds, neither of which justifies its decision not to follow Circuit precedent. First, the District Court noted without further discussion that the tribe in James was a third party and not directly involved in the criminal proceeding. However, the District Court does not explain why the Tribe's status as Plaintiff in this case affords it any less protection against government intrusion of its sovereignty than was afforded the Quinault Tribe in James. In both James and the case at issue here the tribes were in sole possession of confidential documents that the state or federal government claimed to need for effective prosecution of tribal members. In neither case was the tribe the subject of prosecution. Moreover, both tribes refused to disclose their documents because to do so would violate tribal policies.

Second, the District Court balanced the interests at stake in James, compared them to those in the case at issue, and determined that the Bishop Paiute Tribe's interests were less compelling. However, the District Court offered no authority for the application of a balancing test in the present circumstances. By contrast, the Supreme Court has adopted a more categorical approach denying state jurisdiction where states attempt to assert such jurisdiction over a tribe absent a waiver by the tribe or a clear grant of authority by Congress. *See Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458, 132 L. Ed. 2d 400, 115 S. Ct. 2214 (1995) (citing *Bryan,* 426 U.S. 373, 48 L. Ed. 2d 710, 96 S. Ct. 2102). Though the rule is not a per se rule, *see California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 214 215, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987), cases applying a balancing test have involved state assertions of authority over non-members on reservations and in exceptional

circumstances over the on-reservation activities of tribal members, *see, e.g., Mescalero Apache Tribe,* 462 U.S. at 331-332; Confederated Salish & Kootenai Tribes, 425 U.S. at 480. Because Defendants attempted to assert jurisdiction over the Tribe, and not over individual tribal members or non-members on tribal land, the District Court erroneously applied a balancing test.

However, even if a balancing test is the appropriate legal framework, the balance of interests favors a ruling for the Tribe. In James, the Quinault Tribe asserted sovereign immunity to "protect the Native American victim and to foster confidence in the tribe's Social and Health Services." The James Court held that the protection of tribal sovereignty justified the withholding of tribal documents even though they might be relevant to a federal criminal prosecution. *James,* 980 F.2d at 1319-1320. In the present case, the Tribe asserted sovereign immunity to protect its right to self-government. The enforcement of tribal policies regarding employee records is an act of self-government because it concerns the disclosure of tribal property and because it effects the Tribe's main source of income. The Tribe, like California or the federal government, has adopted certain polices and procedures regarding its records. These policies promote tribal interests, such as accuracy in tribal records, confidentiality of members' personal information and a trusting relationship with tribal members. The Tribe's employment policies also affect the Casino, the Tribe's predominant source of economic development revenue.

These interests should be weighed against Defendants' interest in investigating potential welfare fraud--something that could be accomplished through far less intrusive means

than infringing on the Tribe's sovereignty. *See infra* pp. 100-101. It is clear that the interests at stake for the Bishop Paiute Tribe are equally as great as those at stake for the Quinault Tribe in James. Moreover, we find that the state's interest in the present case--the prevention of welfare fraud--is not as great as the federal government's interest in the judicious criminal prosecution in James, and it is certainly not as great as protecting the Tribe's sovereign immunity. Thus, this court reaffirms James and holds that the Tribe is possessed of sovereign immunity which bars execution of the warrant.[3]

C. The County and Its Officials Have Other Less Intrusive Means to Investigate Allegations of Welfare Fraud by Tribal Members.

Although Defendants may need to expeditiously enforce California's welfare laws, their interests must yield to the principles of immunity. *See United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513, 60 S. Ct. 653, 84 L. Ed. 894 (1940). Defendants assert that a decision by

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[3] Following principles of comity and this Circuit's jurisprudence, comparison to cases denying enforcement of state court subpoenas against the United States government is also appropriate. *See Quechan Tribe of Indians*, 595 F.2d at 1155 (noting that the "sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States"). In *Elko County Grand Jury v. Siminoe*, 109 F.3d 554, 556 (9th Cir. 1997), the Ninth Circuit denied the enforcement of a subpoena against a Forest Service employee, holding that principles of sovereign immunity bar a state court from enforcing a subpoena against the United States.

this court to bar the enforcement of search warrants against tribal governments would hamper state and federal governments in their investigations of criminal conduct on Indian land. The Supreme Court has concluded that even though tribal sovereignty might prohibit the states from conducting law enforcement through the most effective means, other adequate alternatives exist. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991) (noting that "there is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives"). Thus, the fact that the County has the burden of seeking other methods to obtain the same information does not justify a diminution of the Tribe's sovereign status.

The Tribe offered several alternatives to the execution of a search warrant in order to assist the District Attorney in his investigation. Most clearly, the County could have followed the Tribe's policies as to confidential tribal records and allowed the Tribe to seek consent from the three employees before disclosing their files. The Tribe also offered to accept, as evidence of a release of the records, a redacted copy of the last page of the welfare application that clearly indicates that employment records for individuals seeking public assistance were subject to review by county officials. However, the District Attorney refused this offer. The Tribe also contends that the County already had evidence of the alleged welfare fraud in its possession. Finally, Defendants had authority, under Public Law 280, to execute a search warrant against the individual tribal members. Such a search would likely uncover relevant documents. The District Attorney's interest in receiving this information through the

processes of the court is no basis to chip away at the Tribe's sovereign status.

III. THE INDIAN GAMING AND REGULATORY ACT DOES NOT PREEMPT PUBLIC LAW 280 AS TO NON-GAMING CRIMES.

The District Court correctly found that IGRA does not preempt Public Law 280 as to non-gaming crimes. IGRA grants the United States "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country..." 18 U.S.C. § 1166(d). *See United States v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir. 1996). In interpreting the preemptive effect of IGRA, the Ninth Circuit stated that if the federal government's exclusive jurisdiction "is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by section 1166(d)." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1995). However, IGRA explicitly concerns gaming operations by Indian tribes. In this case, Defendants were seeking to enforce a warrant as part of an investigation into welfare fraud and not part of allegations of illegal gambling. As the District Court rightly noted, "because the investigation and search warrant deal with a state felony rather than whether a casino game is illegal under state law, there is no IGRA preemption."

We affirm the District Court with respect to its rulings that IGRA did not preempt Public Law 280 as to non-gaming crimes.

IV. CALIFORNIA IS NOT REQUIRED TO AFFIRMATIVELY ADOPT PUBLIC LAW 280 IN ORDER TO ASSUME ITS GRANT OF JURISDICTION.

The District Court correctly found that California was not required to enact enabling legislation that assumed jurisdiction before Public Law 280 would become effective in the State. A direct congressional grant of jurisdiction over Indian country does not require any further action to vest the state with jurisdiction unless state law itself prevents the state from exercising such jurisdiction. *See, e.g., Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 471-72, 58 L. Ed. 2d 740, 99 S. Ct. 740 (1979) (explaining that Public Law 280's mandatory criminal jurisdiction "effected an immediate cession of criminal and civil jurisdiction over Indian country" to affected states). Moreover, California law has clearly held that it was "not required that California enact some form of enabling legislation to assume jurisdiction before the terms of [Public Law 280] became effective in this state." *People v. Miranda,* 106 Cal. App. 3d 504, 165 Cal. Rptr. 154, 155 (Cal. Ct. App. 1980). Other circuits have agreed. The Tenth Circuit found that a direct Congressional grant of jurisdiction over Indian land does not require any further action to vest the state with jurisdiction unless state law itself prevents the state from exercising such jurisdiction. *See United States v. Burch,* 169 F.3d 666, 671 (10th Cir. 1999).

We affirm the District Court with respect to its ruling that California was not required to enact enabling legislation before Public Law 280 became effective.

V. PUBLIC LAW 280 DOES NOT VIOLATE THE TENTH AMENDMENT.

The District Court correctly found that Public Law 280 does not violate the Tenth Amendment of the U.S. Constitution. Public Law 280 grants certain states jurisdictional authority to enforce state criminal laws and limited civil laws over individual Indians in Indian country. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). There is no attempt by Congress to mandate state participation in the enforcement of a federal statutory scheme such as in *Printz v. United States,* 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997), or to require a state legislature to adopt federal regulations such as in *New York v. United States,* 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). By contrast, this federal grant of authority allows states to exert their own criminal and civil laws upon Indians.

We affirm the District Court with respect to its ruling that Congress did not violate the Tenth Amendment in passing Public Law 280.

VI. THE COUNTY OF INYO SHOULD BE HELD LIABLE FOR THE CONDUCT OF THE DISTRICT ATTORNEY AND SHERIFF IN OBTAINING AND EXECUTING THE SEARCH WARRANT AGAINST THE TRIBE.

Municipalities may be held liable under 42 U.S.C. § 1983 for actions which result in a deprivation of constitutional rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). A municipality,

however, cannot be held liable on a respondeat superior theory. *Id.* at 691. To hold a local government liable for an official's conduct, a plaintiff must establish that the government official "(1) had final policymaking authority 'concerning the action alleged to have caused the particular constitutional or statutory violation at issue' and (2) was the policymaker for the local governing body for the purposes of the particular act." *Weiner v. San Diego County,* 210 F.3d 1025, 1028 (9th Cir. 2000) (citing *McMillian v. Monroe County,* 520 U.S. 781, 785, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997)).

A. California Constitutional and Statutory Law and Case Law Favors a Finding that the District Attorney and the Sheriff Acted as County Officers In Obtaining and Executing the Warrant Against the Tribe.

Whether the Sheriff and District Attorney acted as county officers is governed by the analytical framework set out in *McMillian*. In that case, the Supreme Court held that an Alabama sheriff could not be sued under § 1983 for intimidating witnesses into making false statements and suppressing exculpatory evidence because the sheriff was exercising state authority. In reaching this conclusion, the Supreme Court cautioned against a categorical approach, and instead inquired "whether government officials are final policy makers for the local government in a particular area or on a particular issue." *McMillian,* 520 U.S. at 785. The *McMillian* Court directed its inquiry on an analysis of state law, closely examining the Alabama Constitution, statutes and case law. *Id.* at 786-87.

When determining a county's liability under *McMillian*, the Ninth Circuit has engaged in an "independent analysis of California's constitution, statutes and case law." *Streit v. County of Los Angeles,* 236 F.3d 552, 561 (9th Cir. 2001). The Ninth Circuit has given appropriate deference to a state's legal characterization of the government entities while at the same time recognizing that "federal law provides the rule of decision in section 1983 actions." *Id.* at 560 (citing Regents of the Univ. of *Cal. v. Doe,* 519 U.S. 425, 430 n. 5, 137 L. Ed. 2d 55, 117 S. Ct. 900 (1997).

We apply California law and find that the Inyo County District Attorney and Sheriff were acting as county officers. As in *McMillian*, our analysis must begin with the California Constitution. The *McMillian* Court relied heavily on two provisions of the Alabama Constitution. First, and "especially important for our purposes," is the provision in the Alabama Constitution designating a county sheriff as an executive officer. *McMillian*, 520 U.S. at 787. Under the California Constitution, sheriffs and district attorneys are not designated as members of the executive branch. Instead, sheriffs and district attorneys in California are defined in Article XI of the Constitution, entitled "Local Government." Article XI, section 4 of the California Constitution provides that "County charters shall provide for...an elected sheriff, an elected district attorney..."

The *McMillian* Court also gave weight to the fact that the Alabama Supreme Court had authority to impeach a county sheriff for neglect of office. *Id.* at 788. By contrast, the California Constitution does not list sheriffs or district attorneys in Article IV, section 18, which provides for impeachment of a variety of state officers before the

Legislature. Instead, sheriffs and district attorneys can be removed from office following the accusation of the county grand jury. CAL. GOV. CODE § 3060.

Other provisions under the California Constitution and statutes also weigh in favor of finding the District Attorney and Sheriff to be county officers. California law explicitly states that the district attorney and the sheriff are county officers. CAL. GOV. CODE § 24000(a); § 24000(b). The county board of supervisors set the salaries of both the sheriff and district attorney. CAL. GOV. CODE § 25300. Sheriffs and district attorneys must be registered to vote in their respective counties. CAL. GOV. CODE § 24001. The county has the authority to supervise the sheriff and district attorney's conduct and use of public funds. CAL. GOV. CODE § 25303. Finally, sheriffs in California are required to attend upon and obey state courts only within their county. CAL. GOV. CODE § 26603.

In reaching its conclusion that the District Attorney and Sheriff acted as state officers, the District Court gave primary importance to the supervisory authority of the State Attorney General granted under the California Constitution and state statues.[4] *See* CAL. CONST. art. V, § 13 (providing

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[4] "This provision was added in 1934, when the voters approved Proposition 4. As then Alameda County District Attorney Earl Warren told the voters, this constitutional amendment was designed to 'address the lack of organization of our law enforcement agencies' by providing coordination and supervision by the Attorney General 'without curtailing the right of local self government.'" *See* Roe v. County of Lake, 107 F. Supp. 2d 1146, 1150 (N.D. Cal. 2000) (citing Argument in Favor of Proposition 4

that the Attorney General is to have "direct supervision over every district attorney and sheriff...in all matters pertaining to the duties of their respective offices,..."); CAL. GOV. CODE § 12560 (providing that the Attorney General can direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff, and that he may direct the service of subpoenas, warrants of arrest, or other processes of court); CAL. GOV. CODE § 12524 (providing that the Attorney General can call into conference the sheriffs and district attorneys for the purpose of discussing the duties of their office, with the view of uniform and adequate enforcement of state law); CAL. GOV. CODE § 12550, 12560 (providing that the Attorney General has direct supervision over the sheriffs and district attorneys and may require of them written reports concerning investigations, detection and punishment of crimes in their respective jurisdictions).

However, "supervision by the Attorney General does not alter the status of sheriffs [and district attorneys] as elected county officials." *Brewster v. County of Shasta,* 112 F. Supp. 2d 1185, 1190 (E.D. Cal. 2000); *See also People v. Brophy,* 49 Cal. App. 2d 15, 120 P.2d 946, 953 (Cal. Dist. Ct. App. 1942) (Noting that constitutional oversight does not "contemplate absolute control and direction of such officials... Especially is this true as to sheriffs and district attorneys..."). Moreover, to allow the Attorney General's supervisory role to be dispositive on the issue of whether a law enforcement officer acts as a state official would prove too much. The

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by Earl Warren, District Attorney of Alameda County, 1934 General Election Ballot Pamphlet).

California Constitution grants the Attorney General supervisory authority over all "other law enforcement officers as may be designated by law." CAL. CONST. art. V, § 13. Under this provision, if taken to its logical extreme, all local law enforcement agencies in California would be immune from prosecution for civil rights violation, thereby rendering meaningless the decision in Monell, which preserves § 1983 actions against local governments.

The District Court also accorded significance to the fact that the search warrant was obtained to prevent welfare fraud under the state welfare laws. However, the District Attorney and Sheriff were acting on behalf of the County's Department of Health and Human Services, the governmental entity responsible for the administration of the state's welfare laws, including the investigation of overpayments. See CAL. WELF. & INST. CODE § 10800 (providing that the administration of public social services is "declared to be a county function and responsibility and therefore rests upon the boards of supervisors in the respective counties..."). Thus, the fact that state welfare law was at issue does not support a finding that the District Attorney and Sheriff were acting as state officers in their investigation into alleged welfare fraud.

Case law also compels our finding that the District Attorney and Sheriff acted as county officers in obtaining and executing a search warrant against the Tribe.

1. The District Attorney Acted as a County Officer When He Obtained and Executed a Search Warrant Against the Tribe.

In concluding that the District Attorney acted as a state officer, the District Court relied on the California Supreme Court's decision in *Pitts v. County of Kern,* 17 Cal. 4th 340, 949 P.2d 920 (Cal. 1998). In *Pitts*, plaintiffs brought a § 1983 action against the district attorney and county alleging civil rights violations based on misconduct during criminal prosecution. In a thoughtful opinion, the California Supreme Court held that "when preparing to prosecute and when prosecuting criminal violations of state law, a district attorney represents the state..." 949 P.2d at 934. The California Supreme Court, however, recognized the dual roles that a county district attorney performs:

> He is at once the law officer of the county and the public prosecutor. While in the former capacity he represents the county and is largely subordinate to, and under the control of, the [county] board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state.

Id. at 932-33 (citing, *Modoc County v. Spencer,* 103 Cal. 498, 37 P. 483, 484 (Cal. 1894)). Using this framework, the California Supreme Court concluded that when a district attorney engages in prosecutorial conduct, he is a state officer, but at other times, he should be characterized as a county officer. *Pitts,* 949 P.2d at 934.

Whether a district attorney engages in prosecutorial conduct when obtaining and executing a search warrant has

not been addressed by this Circuit in the context of whether a district attorney is a state or county officer. However, the Ninth Circuit has addressed whether this constitutes prosecutorial conduct as opposed to investigatory conduct in the context of a prosecutor's absolute versus qualified immunity. By analogy, these cases inform our decision. In *Fletcher v. Kalina,* 93 F.3d 653, 655 (9th Cir. 1996), the court held that a prosecutor was not entitled to absolute immunity for conduct in preparing a declaration in support of an arrest warrant. In reaching this conclusion, the Fletcher court relied on the Supreme Court's decision in *Buckley v. Fitzsimmons,* 509 U.S. 259, 125 L. Ed. 2d 209, 113 S. Ct. 2606 (1993). The Supreme Court held in Buckley that a prosecutor is not absolutely immune when he allegedly fabricated evidence during the investigation by retaining a dubious expert witness. *Id.* at 273-75. The Court reasoned that "there is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial,...and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested... " *Id.* at 273 (citations omitted). Because the prosecutor's conduct in Buckley fell within the latter category, the Supreme Court denied absolute immunity. *See* also *Malley v. Briggs,* 475 U.S. 335, 342-43, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986) (holding that a police officer who secures an arrest warrant without probable cause cannot assert an absolute immunity defense).

In the present case, the District Attorney was not "preparing to prosecute [or] prosecuting criminal violations," as was the situation in *Pitts*. *Pitts,* 949 P.2d at 934 (emphasis supplied). Instead, the District Attorney was investigating allegations of welfare fraud, conduct more similar to that in

Fletcher. At the time the District Attorney obtained the search warrant, no criminal complaint had been filed against the three tribal members Casino employees whose records were sought--the District Attorney was merely performing his role as "detective." This distinction was recognized and adopted by the District Court when it refused to grant the District Attorney absolute immunity, on the ground that he was engaging in investigatory conduct and not prosecutorial conduct. Finally, the California Penal Code identifies the commencement of prosecution for an offense in only four instances: (a) an indictment or information is filed; (b) a complaint is filed charging a misdemeanor or infraction; (c) a case is certified to the superior court; or (d) an arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint. CAL. PENAL CODE § 804. Because the District Attorney had taken none of these actions when he executed the search warrant, we find that the District Attorney was engaging in investigatory conduct more akin to that of a detective.

Relying on Fletcher and Buckley, and recognizing the significant factual distinctions between this case and *Pitts*, we find that the District Attorney was engaging in investigatory, and not prosecutorial, acts when he obtained and executed a search warrant over the Tribe. This conclusion compels our finding that the District Attorney acted as a county officer when obtaining and executing a search warrant against the Tribe.

2. The Sheriff Acted as a County Officer When He Executed a Search Warrant Against the Tribe.

With respect to the Sheriff's conduct, the District Court recognized that the California courts of appeal and federal district courts in this Circuit have reached different conclusions on whether a sheriff is a state or county officer. The majority of the cases cited by the District Court discuss the sheriffs' role in their function as jail administrators. However, since the District Court's ruling, the Ninth Circuit held that California sheriffs, functioning as jail administrators, are county officials. *See Streit,* 236 F.3d at 565. So holding, the court relied heavily on the constitutionally and statutorily defined role of California sheriffs discussed above. *Streit,* 236 F.3d at 561-562; *see supra* p. 105-107.

In support of our conclusion, we also rely on several recent federal district court decisions that hold that the sheriff is properly viewed as a county officer when he investigates alleged criminal conduct. *See Ford v. County of Marin,* 2001 U.S. Dist. LEXIS 10909, 2001 WL 868877 at *8 (N.D. Cal. July 19, 2001) (denying defendants' motion to dismiss on the grounds that the sheriff, when knowingly giving false information to the Housing Authority with the intent of initiating a nuisance lawsuit, did not act as a state officer); *Brewster,* 112 F. Supp. 2d at 1191 (holding that the sheriff, when investigating crimes, acts as a county officer).

Finally, we note persuasive language from the California Supreme Court on how the state's highest court views the role of county sheriffs. *Dibb v. County of San Diego,* 8 Cal. 4th 1200, 884 P.2d 1003 (Cal. 1994). In a case

concerning a county's authority to create a citizen board to oversee the Sheriff's Department, the court noted that "the operations of the sheriff's...departments and the conduct of employees of that department are a legitimate concern of the [county] board of supervisors." 884 P.2d at 1008.

Based on the foregoing, we conclude that the Sheriff acted as a county officer when obtaining and executing a search warrant against the Tribe.

B. The District Attorney and Sheriff Have Final Decision Making Authority to Obtain and Execute a Search Warrant.

There is no dispute that the District Attorney or Sheriff have final decision making authority to obtain and execute search warrants for the County of Inyo.

VII. THE DISTRICT ATTORNEY AND THE SHERIFF ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The Tribe further asserts claims against the District Attorney and the Sheriff in their individual capacities. The Eleventh Amendment does not bar § 1983 claims against state officers sued in their individual capacities. *Hafer v. Melo,* 502 U.S. 21, 25-27, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991); *Demery v. Kupperman,* 735 F.2d 1139, 1146 n. 3 (9th Cir. 1984).

The District Court correctly held that neither the District Attorney nor the Sheriff are entitled to absolute immunity. However, the District Court erroneously concluded

that the District Attorney and Sheriff were entitled to qualified immunity.

Qualified immunity "shields [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Behrens v. Pelletier,* 516 U.S. 299, 305, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). Our analysis of the question whether the defendants are entitled to qualified immunity follows a two part test: "1) we ask whether the law governing the official's conduct was clearly established; 2) if so, we ask whether, under that law, a reasonable officer could have believed the conduct was lawful." *Robinson v. Solano County,* 218 F.3d 1030, 1034 (9th Cir. 2000).

A. A Reasonable Officer Executing a Search Warrant Against a Tribe At the Time the County Officers Executed the Search Warrant Against the Bishop Paiute Tribe Would Know that He is Acting Outside of His Jurisdiction and In Violation of The Fourth Amendment.

In order for a right to be "clearly established "its "contours must be sufficiently clear that [at the time of the alleged conduct] a reasonable officer would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). The Supreme Court recently held that a "media ride-along" when the police delivers a warrant violates the Fourth Amendment, but because the state of the law was not clearly

established at the time the case took place, the officers were entitled to qualified immunity. *Wilson v. Layne,* 526 U.S. 603, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999). The Supreme Court refused to hold the officers liable because "petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely." *Wilson,* 526 U.S. at 617.

By contrast, at the time the District Attorney and Sheriff obtained and executed a warrant, the law was clear in this Circuit that a search warrant cannot be executed on tribal property. *See James,* 980 F.2d at 1319. The law was also clear that county officers act beyond their jurisdiction when they issue and execute search warrants on tribal property. *See Sycuan Band of Mission Indians v. Roache,* 788 F. Supp. 1498, 1508 (S.D. Cal. 1992), aff'd, 54 F.3d 535, 543-44 (9th Cir. 1995).

In Sycuan Band of Mission Indians the district court held that county sheriffs acted beyond their authority by executing a search warrant for property within Indian reservations, over which the state never obtained jurisdiction. 788 F. Supp. at 1508. The district court affirmed the general principle that "a judicial officer's writ cannot run outside the officer's jurisdiction," and concluded that the search warrant was invalid because the state had no jurisdiction over the reservation to enforce its laws. *Id.* (citing *United States v. Strother,* 188 U.S. App. D.C. 155, 578 F.2d 397, 399 (D.C. Cir. 1978)). The court also relied on California law, which indicates that the defendants acted beyond their authority by executing the warrants on the reservations. *Id.* California Penal Code § 830.1 defines the territorial limitations of peace

officers, including sheriffs and their deputies, in enforcing the law. The peace officers's authority extends to "any public offense... within the political subdivision which employs" the sheriff. If the sheriff acts outside this territorial jurisdiction, the sheriff has no law enforcement powers other than those that any private citizen would have. (*See People v. Pina,* 72 Cal. App. 3d Supp. 35, 140 Cal. Rptr. 270, 272 (Cal. App. Dep't Super. Ct. 1977)). The court concluded, therefore, that because the reservations at issue were not within the political subdivision which employed the sheriff or his deputies, the defendants acted beyond their authority by executing the search warrants. *Id.*[5]

In light of James and Sycuan Band of Mission Indians, we hold as a matter of law that a reasonable county officer, executing the search warrant on tribal property at the time the search warrant was executed against the Bishop Paiute Tribe, would have known that the search warrant was being executed

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[5] The Tenth Circuit has also addressed the authority of the states to execute search warrants and to arrest individuals on reservations. In *United States v. Baker,* 894 F.2d 1144 (10th Cir. 1990), state authorities executed a search warrant on a tribal reservation. The Tenth Circuit concluded that the search warrant was invalid, and therefore the evidence should have been suppressed, because the state had no jurisdiction over the reservation to enforce its laws--including the execution of a search warrant--unless Congress consented to the state's jurisdiction. *Id.* at 1147. *See also Ross v. Neff,* 905 F.2d 1349, 1354-55 (10th Cir. 1990) (holding that the arrest of an Indian on Indian land was illegal because the state had no jurisdiction over the reservation to enforce its laws--including the execution of a search warrant--unless Congress consented to the state's jurisdiction).

outside of his jurisdiction and thus in violation of the Fourth Amendment. We further conclude that the execution of a search warrant beyond a county officer's jurisdiction is actionable under § 1983.[6]

C.

In sum, the District Court order granting Defendants' motion to dismiss is reversed in part and affirmed in part. Public Law 280, by its terms, legislative history, and analysis in case law, does not confer criminal jurisdiction to the states over sovereign Indian tribes. Thus, the County did not have jurisdiction to execute a search warrant against tribal property. We also reverse the District Court's decision to deny Plaintiff's § 1983 action, on the ground that the District Attorney and Sheriff acted as state officers, and not county officers, when obtaining and executing the search warrant on tribal property. Furthermore, we reverse the District Court's grant of qualified immunity to the District Attorney and Sheriff because the execution of a warrant in excess of county officers' jurisdiction violates the Fourth Amendment.

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[6] Our conclusion that the Tribe may bring a 42 U.S.C. § 1983 action against the District Attorney and the Sheriff based on a search warrant executed against tribal property, and therefore executed in excess of the county officers' jurisdiction, is not precluded by *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989). Hoopa Valley held that the right to tribal self-government is not a protected interest under § 1983. In this case, we conclude that a search warrant executed in excess of the county officers' jurisdiction violates the Fourth Amendment and is therefore actionable under § 1983.

We affirm the District Court's decisions that: (1) IGRA does not preempt Public Law 280, (2) California did not need to enact enabling legislation before it could properly exercise jurisdiction under Public Law 280, and (3) Public Law 280 does not violate the Tenth Amendment.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CV-F-00-6153 REC LJO

[Filed November 22, 2000]

BISHOP PAUITE TRIBE and
BISHOP PAUITE GAMING CORPORATION
d.b.a. PAUITE PALACE CASINO
Plaintiffs,

v.

COUNTY OF INYO, PHILLIP MCDOWELL, individually and in his official capacity, and DANIEL LUCAS, individually and in his official capacity,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On October 30, 2000 the court heard defendants' Motion to Dismiss. Upon due consideration of the written and oral arguments and the record herein, the court grants the motion for the reasons set forth herein.

I. Plaintiffs' Allegations

Plaintiffs allege five claims in the Complaint. In the first claim, plaintiffs aver that some time after February 14, 2000, the Inyo County District' Attorney's office requested the Paiute Palace Casino to provide it with payroll records for three casino employees-- Patricia Dewey, Clifford Dewey and Tinya Hill -- all members of the Bishop Paiute Tribe. Complaint, ¶¶ 17 & 19. The request related to an investigation then being undertaken by the district attorney's office into potential welfare fraud. *Id.* at ¶ 17. In response to the request, the casino informed the district attorney's office that it was Plaintiff's long standing custom, practice and policy not to provide the records unless it got written authorization to do so from the three employees. *Id.* Thereafter, on March 23, 2000, the district attorney's office obtained a search warrant for the records. *Id.* at ¶ 18. Plaintiffs further allege that the search was executed with the assistance of the Sheriff's Department for the County of Inyo, by use of force and intimidation. *Id.* at ¶ 21. Deadbolt cutters were used to cut the locks off of the storage facility where the confidential personnel records were stored. *Id.* The records allegedly were not limited to the individuals identified in the search warrant but also included the personnel records of seventy-eight other employees who were not subject to criminal investigation. *Id.*

Plaintiffs' also allege that the search warrant is unlawful because it infringed upon plaintiffs' right to remain free from state interference with their right to self-governance as proscribed by federal law. *Id.* at ¶ 28. Plaintiff contend that Public Law 280 does not permit the defendants to execute a search warrant covering casino property. *Id.* Plaintiffs seek

declaratory relief against all defendants, declaring that Public Law 280 does not allow for the issuance and execution of search warrants upon casino property.

The second claim is also a request for declaratory relief. Plaintiffs allege that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, preempts whatever jurisdiction the State of California otherwise might have to directly apply and enforce California laws against plaintiffs and their officers, agents, employees, contractors and patrons in any manner within the Pauite Palace Casino. *Id.* at ¶ 29. In addition, plaintiffs allege that the Tribal-State Compact allows the state's access to the records solely to ensure the compliance of the compact. *Id.* at ¶ 30-31.

The third claim alleges a section 1983 claim. Plaintiffs aver that in obtaining and executing the search warrant, District Attorney Phillip McDowell and Sheriff Dan Lucas acted willfully, knowingly and with specific intent to deprive plaintiffs of their constitutional rights and rights under the IGRA. *Id.* at ¶ 38. Plaintiff also alleges that defendant McDowell acted consistently with the policies of the County of Inyo. Plaintiff request monetary damages and attorney's fees.

Plaintiffs' fourth claim seeks an injunction against the County, District Attorney McDowell, Sherif Lucas and their deputies and subordinates to enjoin them from obtaining additional search warrants to obtain employment records in connection with other fraud investigations. *Id.* at ¶¶ 22, and 41-42.

The fifth claim seeks declaratory relief in connection with a request for supplemental jurisdiction under 28 U.S.C. 1367(a). *Id.* at ¶ 44. Plaintiffs allege that California has no jurisdiction over Indian lands pursuant to Public Law 280 because the California Legislature has not specifically enacted legislation accepting such jurisdiction. *Id*, at ¶¶ 45-48. Alternatively, plaintiffs seek a declaratory judgment that Public Law 280 is invalid because the Tenth Amendment precludes Congress from directing California to assume criminal jurisdiction over Indian lands. *Id.* at ¶ 52.

II. Motion to Dismiss under Fed. R. Civ. p. 12(b) (6)

A. Standard

Under Rule 12(b) (6), "dismissal for failure to state a claim is proper 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' "*Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993). Rule 12(b)(6) should be read in conjunction with Rule 8 (a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 1355-56 (1990). Moreover, a court "must accept all material allegations in the complaint as true, and construe them in the light most favorable [to the plaintiff]." *NL Industries v. Kaplan*, 792 F.2d 896 (9th Cir. 1986).

In addition, unless a Rule 12 (b)(6) motion is converted to a motion for summary judgment, "evidence outside the pleadings ... cannot normally be considered in

deciding a 12(b) (6) motion." *Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993). However, a court may consider material submitted as part of the complaint and take judicial notice of facts outside the pleadings. *Hal Roach Studios v. Richard Fiener & Co.*, 896 F.2d 1542, 1554 n.19 (9th Cir. 1990); *Mack v. South Bay Beer Distribs., Inc.* 798 F.2d 1279, 1282 (9th Cir. 1986). Furthermore, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (documents referred to in complaint but not attached to complaint may be considered by trial court for Rule 12(b) (6) motion); *Parrino v, FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998). Where claims in the complaint are made based on documents, the documents are no longer matters outside the pleadings but are part of the record. *Townsend v. Columbia Operations,* 667 F.2d 844, 848 (9th Cir. 1982).

B. Judicial Notice

Under Federal Rule Evidence 201(d), the court shall take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

In connection with its motion to dismiss, defendants req/lest judicial notice of the following: (1) the search warrant

affidavit; (2) the search warrant; (3) the return to the search warrant; (4) the State of California IEVS/Integrated Fraud Detention System report; (5) the documents obtained in the search warrant; (6) the Deed to the casino execution of property; (7) the Tribal-State Compact; and (8) notice of the approval of the Compact in the Federal Register.

The documents are specifically referred to in the Complaint and its authenticity is not questioned by either parties. Moreover, the documents are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned because they are official records and documents. Thus, the court takes judicial notice of the documents.

C. Section 1983 Claim

1. County of Inyo

Defendants contend that plaintiffs' section 1983 claim[1] against the County of Inyo should be dismissed because the County is not liable for the acts of the district attorney and sheriff in the performance of their official prosecutorial, investigative and law enforcement duties.

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[1] 42 U.S.C. section 1983 provides: Every' person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

A local government may not be sued under § 1983 for constitutional torts inflicted by its employees or agents unless a plaintiff can show that his injury was the result of the government's policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 694 (1978). There is no respondeat superior liability under section 1983. *Id.* at 692. "To hold a local government liable for an official's conduct, a plaintiff must first establish that the official (1) had final policymaking authority 'concerning the action alleged to have caused the particular constitutional or statutory violation at issue' and (2) was the policymaker for the local governing body for the purposes of the particular act." *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000) (quoting *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 785 (1997)). The court's determination of whether the official is acting for the state or the county is dependent on an analysis of state law based on the state's constitution, statutes and case law. *McMillian*, 520 U.S. at 785, 787-93.

Under the California Constitution, both the sheriff and the district attorney have dual roles as agents for the state and the county. Article XI, section l(b) states that "the Legislature shall provide ... an elected county sheriff, an elected district attorney " Article XI, section 4 establishes county charters that provide for an elected sheriff and an elected district attorney ... their election or appointment, compensation, terms and removal." Article IV, section 13 allows the Attorney General to have "direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime

in their respective jurisdictions as the Attorney General may seem advisable."

Likewise, under California statutory law, the sheriff and district attorney have dual functions as both state and county officials. There are some provisions that suggest that the sheriff and district attorney are county officers. Cal. Gov. Code § 24000 states that both the sheriff and district attorney are county officers. In addition, counties set the salaries of the sheriff and district attorney under Cal. Gov. Code § 25300. Also, the sheriff and district attorney must be registered to vote in their respective counties pursuant to Cal. Gov. Code § 24001. Moreover, under Cal. Gov. Code § 3060, the sheriff and the district attorney can be removed from office following the accusation of the county grand jury. Finally, Cal. Gov. Code § 25303 allows the county to supervise the sheriff and district attorney's conduct and use of public funds. However, there are other provisions that indicate that the sheriff and district attorney are state officers. Cal. Gov. Code § 25303 provides that county supervision "shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney." In addition, Cal. Gov. Code §§ 12550 and 12560 provide the Attorney General direct supervision over the sheriffs and district attorneys and may require of them written reports concerning the investigation, detection and punishment of crimes in their respective jurisdictions. Moreover, under Cal. Gov. Code § 12560, the Attorney General can direct the activities of any sheriff relative to the investigation or detection of crime within the Jurisdiction of the sheriff, and he may direct the service of subpoenas, warrants of arrest, or other processes of court. Also, the Attorney General can call into conference the

sheriffs and district attorneys for the purpose of discussing the duties of their office, with the view of uniform and adequate enforcement of state law under Cal. Gov. Code § 12524.

With respect to case law, the Ninth Circuit has stated that the federal court must consider California state law to give due respect to decisions by the California Supreme Court as the ultimate interpreter of California state law. *Weiner v. San Diego County*, 210 F.3d 1025, 1030 (9th Cir 2000) Moreover the court stated that "[a]ll relevant California cases, including *Pitts*, have held that district attorneys are state officers for the purpose of investigating and proceeding with criminal investigations." *Id.*

In *Pitts v. County of Kern*, 17 Cal.4th 340, 362 (1998), the California Supreme Court after a *McMillian* analysis, concluded that the district attorney represented the state when preparing to prosecute and when prosecuting criminal violations of state law. Likewise, in *Weiner*, the Ninth Circuit found that the district attorney was a state officer when deciding whether to prosecute an individual. *Weiner*, 210 F.3d at 1031.

With respect to whether the sheriff acts as a county or state officer, the state and federal courts have reached differing conclusions. The court in County of *Los Angeles v. Superior Court (Peters)*, 68 Cal. App.4th 1166, 1178 (1998), concluded that in setting policies concerning the release of persons from the county jail, the sheriff acted as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the county. Moreover, two district courts have hell that the sheriff acts as a state official when providing security for the superior court. *Hawkins v.*

Comparet-Cassani, 33 F. Supp.2d 1244, 1253 (C.D. Cal. 1999); *Boakye-Yiadom v. County of San Francisco*, 1999 WL 638260, at * 3 (N.D. Cal. August 18, 1999). In addition, one district court found that the Sheriff is a state official when acting as a jailer. *Smith v. County of San Mateo*, 1999 WL 672318, at *7 (N.D. Cal. Aug. 20, 1999). However, another district court held the opposite, concluding that the sheriff acted on behalf of the county when he operated the county jail and made policy concerning the treatment of inmates and arrestees in need of medical attention. *Leon v. County of San Diego*, 2000 WIL 1476330, at *5 (S.D. Cal. Sept. 9, 2000). In addition, a district court has held that the sheriff is a county official when he encourages mistreatment of female crime victims or does not adequately prepare his staff to deal with female spousal abuse victims. *Roe v. County of Lake*, 107 F. Supp.2d 1146, 1152 (N.D. Cal 2000).

In the present case plaintiffs allege that the County is liable because the sheriff and the district attorney executed the search warrant in their investigative capacities as county officials, However, based on statutory law and case law, the court concludes that the sheriff and the district attorney acted as state officials when the district attorney requested the search warrant from the superior court and the sheriff executed the search warrant. First, under Article IV, section 13, the Attorney General has direct supervision over every district attorney and sheriff and may require them to make reports concerning the investigation, detection, prosecution, and punishment of crime in their, respective jurisdictions as the Attorney General may seem advisable. This language is reflected in Cal. Gov Code § 12550 and 12560. Second, under § 12560, the Attorney General can direct the activities of any sheriff relative to the investigation or detection of

crime within the jurisdiction of the sheriff, and he may direct the service of subpoenas, warrants of arrest, or other processes of court. Also the attorney General can call into conference the district attorneys and sheriffs for the purpose of discussing the duties of their office, with the view of uniform and adequate enforcement of state law under Cal. Gov. Code § 12524. Third, when the sheriff and or his deputies execute the search warrant, they act at the bequest of the superior court, which issued the search warrant Unlike *Roe*, which dealt with the sheriff departments treatment of women victims, and *Leon*, which addressed the medical treatment of arrestees, the present case deals with the execution of a facially valid search warrant ordered by the superior judge, a state official. Here, the situation is more similar to *Hawkins* and *Boakye-Yiadom*, where the courts held that the sheriff acted as a state official when he provided security for the superior court. Finally, the district attorney and sheriff were conducting an investigation into the alleged violations of state felonies involving welfare fraud when they executed the search warrant. Notwithstanding the fact that the County is responsible for the investigation of applications for Aid to Families with Dependent Children (ADFC) under Cal. Wel. & Inst. Code § 18491 and the administration of AFDC programs pursuant to Cal. Wel. & Inst. Code § 18470, the court finds that the search warrant was obtained and executed in furtherance of state law to prevent welfare fraud.

2. District Attorney

Neither states nor state officials acting in their official capacities are "persons" within the meaning of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71

(1989). "[A] suit against a state official in his or her official is not a suit against the official but rather is a suit against the official's office." *Id.* Personal capacity suits seek to impose personal liability upon a government official for the actions that he takes under color of state law. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). "official capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Id.* (citation omitted).

The court finds that the district attorney acted in his official capacity as a state official when the district attorney's office obtained a search warrant in connection with the welfare fraud investigation. Thus, the district attorney is not liable in his official capacity because he is not a person for purposes of section 1983 liability.

With respect to the personal capacity suit, defendant McDowell argues that he has absolute and qualified immunity.

The prosecutor is afforded absolute immunity from a civil suit for damages under § 1983 when initiating a prosecution and presenting the State's case. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) An absolute immunity defeats the suit at the outset provided that the official's actions were within the scope of the immunity. *Id.* at 419 n.13. The Supreme Court declined to consider whether absolute immunity applied to aspects of the prosecutor's responsibilities that cast him in the role of an administrator or investigative officer rather than that of advocate. *Id.* at 430-31. In particular, the Court left standing *Pierson v. Ray*, 386 U.S. 547, 557 (1967) which held that a prosecutor engaged in certain investigative activities enjoys, not the absolute

immunity associated with the judicial process, but only a good-faith defense comparable to a police officer's defense. *Id.* at 430.

In the present case, the district attorney's office filed for the search warrant during an investigation into welfare fraud. Thus, the district attorney is not afforded absolute immunity but has qualified immunity.

Government officers performing discretionary functions may exert a qualified immunity in so far as their conduct does not violate clearly established statutory or constitutional rights that would have been known to a reasonable person. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Horlow*, 457 U.S. at 818. The judge may appropriately consider whether the law was clearly established at the time the action occurred. *Id.*

Here, plaintiffs allege that District Attorney McDowell was put on inquiry notice that his acts where illegal based on the California's policy with respect to tribal sovereignty. Plaintiffs point to the preamble to the Compact as evidence of the stare's policy of fostering tribal-state cooperation. In addition, plaintiffs argue that Cal. Fish & Game Code § 1600-1610 authorizes the Department of Fish & Ga/ne to execute agreements on behalf of the State and other Native American

tribes; thus, there is tribal-state cooperation with respect to jurisdictional disputes. Finally, the California Legislature recently passed Assembly Concurrent Resolution No. 185, which:

> reaffirms state recognition of the sovereign status of federally recognized Indian tribes as separate and independent political communities within the United States, and encouraging all state agencies, when engaging in activities or developing policies affecting Native American tribal rights or trust resources, to do so in a knowledgeable, sensitive manner that is respectful of tribal sovereignty, and encourage all state agencies to continue to reevaluat, and improve the implementation of laws affecting the Native American tribal rights.

In addition, plaintiffs argue that the search warrant was invalid because it failed to inform the superior court that there was no jurisdiction to execute the search warrant and the seized records of seventy-eight other tribal employees went beyond the scope of the search warrant.

A fraud investigation that required the search and seizure of payroll records does not violate California policy even in light of the State's recent expression of respect and recognition for tribal sovereignty. California's policy does not conflict with Public Law 280, which allows the state and thus the district attorney to impose California criminal law on tribal lands. Moreover, the district attorney's alleged failure in informing the court of possible jurisdictional problems is not troubling because the magistrate should have considered

this when he issued the search warrant. Thus, the court concludes that the district attorney has qualified immunity because his conduct did not violate any clearly established statutory or constitutional rights.

3. Sheriff

The sheriff was acting as a state officer when his department executed the warrant. As such, he is not liable under section 1983 in his official capacity. With respect to the individual capacity suit, the sheriff has qualified immunity because his department merely executed a facially valid search warrant signed by the magistrate. Having reviewed the payroll records that were seized during the execution of the warrant, the court finds that the execution of the search warrant was within the warrant's Scope because each page contained at least one reference to the employees that were under investigation.

D. Public Law 280 and Sovereign Immunity

Plaintiffs contend that their sovereign immunity precluded the issuance of the search warrant. They contend that Public Law 280 does not provide the defendants with authority to search and seize the payroll records even where there is probable cause under the Fourth Amendment. Defendants assert that they are entitled to obtain and execute the search warrant pursuant to Public Law 280.

Public Law 280 grants certain states criminal jurisdiction over Indians who commit or are victims of crimes on reservations. Section 18 U.S.C. § 1162 provides in pertinent part:

> Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State. . .and the criminal laws Of such State . . .shall have the same force and effect within such Indian country as they have elsewhere within the State. . . :
> California. . . all Indian country within the State.

The Supreme Court explained that "the primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County,* 426 U.S. 373, 379 (1976). In determining whether a state has Public Law 280 jurisdiction, the court must look to the intent of the state law. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209(1987). If the intent of the state law is generally to prohibit certain conduct, the conduct falls within Public law 280's grant of criminal jurisdiction as criminal/prohibitory; but, if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Public Law 280 does not authorize its enforcement on an Indian reservation. *Id.*

Here, California has criminal jurisdiction over Native Americans oh tribal lands under Public Law 280 because the laws that the district attorney and sheriff sought to enforce are criminal/prohibitory laws rather than regulations. The more

difficult question is whether the state has jurisdiction over the tribe itself.

In *Bryan v. Itasca County*, the Supreme Court indicated that Public Law 280 did not explicitly confer state jurisdiction over tribes. The court stated,

> [N]othing in [Public Law 280]'s legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes, into little more than "private, voluntary organizations" - a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U.S.C. § 1360(c), providing for the "full force and effect" of any tribal ordinances or customs "heretofore or hereafter adopted by an Indian tribe . . .if not inconsistent with any applicable civil law of the State" contemplates the continuing vitality of tribal government.

Bryan v. Itasca County, 426 U.S. at 388 (citations omitted). However, the discussion of Public Law 280 was in connection with the Court's review of 28 U.S.C. § 1360, which grants limited civil jurisdiction to the states. Moreover, the Supreme

Court has refused to apply a per se rule that would exclude state jurisdiction over tribes and tribal members in the absence of express congressional consent. *Cabazon Bond of Mission Indians*, 480 U.S. at 214-15.

In *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), the Native American defendant was accused of raping another Native American. He requested documents relating to the victim's alleged alcohol and drug problems that were in the possession of a tribe's Department of Social and Health Services. *Id.* The district court quashed the subpoena to the Quinault Indian Nation based upon sovereign immunity. On appeal, the Ninth Circuit affirmed. The court stated,

> By making individual Indians subject to federal prosecution for certain crimes, Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is waived. . . The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim.

Id. at 1319. The court concluded that the Quinault Tribe possessed tribal immunity at the time the subpoena was served. *Id.* Moreover, !the court found that the Quinault Indian Nation did not explicitly waive its sovereign immunity in the Social and Health Services documents when it voluntarily gave different documents relating to the victim that were located in the Housing Authority files. *Id.* at 120.

The plaintiffs seek to analogize *United States v. James* to the present case. Plaintiffs argue that if the Ninth Circuit

finds no authority for the federal court to obtain tribal records by issuance of a subpoena, then the State and its political subdivisions should have no greater authority to seize payroll documents pursuant to a search warrant. However, the present case is distinguishable from *James*. In *James*, the tribe was a third party and was not directly involved in the criminal prosecution. The tribe asserted sovereign immunity to protect the Native American victim and to foster confidence in the tribe's Social and Health Services. In the present case, plaintiffs' claim of sovereign immunity advances the tribe's right to self-governance, but does so, at the expense of the state's interest in preventing welfare fraud. In the interest of a fair and uniform application of California's criminal law, state officials should be able to execute search warrant against the tribe and tribal property. Thus, the court finds that the tribe's sovereign immunity does not prohibit the execution of the search warrant against the tribe and its property.

E. Indian Gaming Regulatory Act

The plaintiffs argue that the IGRA eviscerated any jurisdiction that Defendants asserted prior to the passage of IGRA. In addition, the plaintiffs argue that there was no compact in place at the time of the unlawful search of the Tribe's gaming facility.

The IGRA provides that "[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country" in the absence of a compact providing for state jurisdiction. 18 U.S.C. § 1166(d). "If that exclusivity is incompatible with any provision of Public Law 280, then the Public Law 280 provision20 has been impliedly

repealed by section 1166(d)." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994). As the Eight Circuit explained, "Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it to completely preempt state law." *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996).

Here, the investigation and the execution of the search warrant involves welfare fraud, not gaming regulation by the state. The fact that the search warrant was executed at a gaming facility is unimportant. Because the investigation and search warrant deal with a state felony rather than whether a casino game is illegal under state law, there is no IGRA preemption. Although both parties mention the Compact in their analysis of whether there is IGRA preemption of Public Law 280, the court does not address the Compact because it concludes that IGRA does not preempt Public Law 280.

F. Constitutionality of Public Law 280

Plaintiffs contend that the California Legislature must affirmatively adopt Public Law 280 before the executive branch may impose criminal jurisdiction. Plaintiffs argue that the executive branch may not assume the fundamental act of establishing policy or be delegated the act of establishing policy by the legislature. As plaintiffs acknowledge, the one case addressing this issue under California law directly contradicts plaintiffs' argument.

In *People v. Miranda*, 106 Cal. App.3d 504, 505 (1980), the Native American defendant was charged with arson committed on Indian land. The trial court held that the

California courts did not have jurisdiction. *Id.* The appeals court reversed. *Id.* The court stated that "it was not required that California enact some form of enabling legislation to assume jurisdiction before the terms of 18 U.S.C. 1162 became effective in this state." The Tenth Circuit, analyzing Colorado law agreed, stating:

> A direct congressional grant of jurisdiction over Indian country does not require any further action to vest the state, with jurisdiction unless such state law itself prevents the state from exercising such jurisdiction. Upon cessation of such jurisdiction to a state, federal law no longer preempts the state's exercise of its inherent police power over all persons within its borders, and the state is automatically vested with jurisdiction in the absence of state law to the contrary.

The plaintiffs distinguish *Burch* from the present case by arguing that *Burch* involved Colorado law, not California law. According to plaintiffs, Colorado is different from California because it was a voluntary state that became a mandatory state in 1984 while California was one of the five mandatory states when Public Law 280 was enacted. Because Colorado only later became a mandatory state, the *Burch* court only addressed preemption. Plaintiffs argue that the analysis for California law is different from Burch because California's Tenth Amendment was and continues to be violated by Public Law 280. Plaintiffs' attempt to distinguish the holding of *Miranda* from the present case is unpersuasive because there is no Tenth Amendment violation as the court will address shortly. Since there are no cases to the contrary

after fifty years, the court concludes that Public Law 280 is enforceable by the executive branch without need of an enabling act.

Finally, plaintiffs argue that Public Law 280 violates the Tenth Amendment. They contend, that Public Law 280 improperly imposes upon California, the burden of implementing the federal government's scheme to meet the federal government's obligation to ensure law and order on Indian lands.

The court agrees with the defendants that there is no implementation of a federal government scheme here. There is no attempt by congress to mandate that the state assist in the enforcement of a federal statutory scheme such as in *Printz v. United States*, 521 U.S. 898 (1997) or to require the state legislature enact one of three laws proposed by the federal government as in *New York v. United States*, 505 U.S. 144, 162 (1992). Rather, Public Law 280 allows California to impose its own state criminal law. Here, Congress is simply allowing California to exert its police power over the Indian lands within its boundaries. Thus, the court finds that Congress did not violate the, Tenth Amendment in passing Public Law 280.

ACCORDINGLY, IT IS SO ORDERED that Defendants' Motion to Dismiss be granted.

Dated: November 22, 2000.

/s/ _____
ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

APPENDIX D

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983.

This statute concerns civil actions for deprivation of rights. Its full text provides:

"§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

2. 18 U.S.C. § 1152.

This statute concerns crimes and Indians, and is commonly known as the "General Crimes Act." Its full text provides:

"§ 1152. Laws governing

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

3. 18 U.S.C. § 1153.

This statute also concerns crimes and Indians, and is commonly known as the "Major Crimes Act." Its full text provides:

"§ 1153. Offenses committed within Indian country

"(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the

Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

"(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

4. 18 U.S.C. § 1162.

This statute concerns the applicability of State criminal law in the six identified States to crimes committed by or against Indians in the Indian Country of those States. It is commonly known as "Public Law 280." Its text provides in pertinent part:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"State or Territory of	Indian country affected
"Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
"California	All Indian country within the State
"Minnesota	All Indian country within the State, except the Red Lake Reservation
"Nebraska	All Indian country within the State
"Oregon	All Indian country within the State, except the Warm Springs Reservation
"Wisconsin	All Indian country within the State

"(b) . . . .

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction."